SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 650

PHIL WHITUS AND LEON DAVIS, PETITIONERS,

vs.

GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Number 1229

PHIL WHITUS, Petitioner-Appellant,

vs.

THE STATE OF GEORGIA, Appellee.

NOTICE OF APPEAL—Filed October 30, 1965

To the Honorable Martha B. Hoggard, Clerk of the Above Entitled Court, and to the Honorable Fred B. Hand, Jr., Solicitor Thereof:

You and each of you take notice that PHIL WHITUS, the Petitioner in the above styled matter, hereby appeals to the Supreme Court of the State of Georgia the verdict of guilty rendered by the jury on the 19th day of October, 1965, in the Superior Court of Mitchell County, Georgia.

Petitioner specifies, as necessary for a clear understanding of all the issues in said matter, the following:

1. The warrant.
2. The bill of indictment returned by the Grand Jury of the April 1965 Term.
3. A *complete* transcript of the evidence taken at said trial.

This 29th day of October, 1965.

P. Walter Jones.

[fol. 4] [File endorsement omitted]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Number 1229

PHIL WHITUS, Petitioner-Appellant,

vs.

THE STATE OF GEORGIA, Appellee.

AMENDMENT TO NOTICE OF APPEAL—Filed November 13, 1965

To the Honorable Martha B. Hoggard, Clerk of the Above Entitled Court, and to the Honorable Fred B. Hand, Jr., Solicitor Thereof:

You and each of you take notice that PHIL WHITUS, the Petitioner in the above styled matter, hereby amends his original notice of appeal to the Supreme Court of the State of Georgia from the verdict of guilty rendered by the jury on the 19th day of October, 1965, in the Superior Court of Mitchell County, Georgia, as follows:

A. By adding thereto as additional evidence the following:

1. The Challenge to the Array of Petit Jurors filed with this Court and heard on the 16th day of October, 1965, and overruled on the same date.

2. A complete transcript of record in the overruling of said motion.

3. The evidence presented by the defendant at the inception of the trial showing that he had not been [fol. 5] arraigned nor had the defendant waived arraignment.

This 12th day of November, 1965.

P. Walter Jones.

P. O. Box 1115, Albany, Georgia.

[fol. 6] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

WARRANT—November 16, 1959

GEORGIA, Mitchell County

Personally Comes John M. Maples Who, on oath says to the best of his knowledge and belief Phil Whites did, in said County, on the 15 day of Nov 19 59 commit the offense of Murder The murder of Jones Eldridge (Pete) Glenn-

$1,500

And deponent makes this affidavit that a warrant may issue for his arrest.

John M. Maples (SEAL)

Sworn to and subscribed before me 16 day of Nov 19 59

C. Pruett J.P.

GEORGIA, Mitchell County

To any Sheriff, Constable or Marshal of said State.— GREETING:

John M. Maples Makes oath as above which is hereby made part of this warrant. You are hereby commanded to arrest Phil Whites and seize a sufficient amount of his property to pay all costs in event of his conviction and bring them before me, or some other judicial officer of said County to dispose of as the law directs. Fail not.

Witness my hand and seal 16 Nov 19 59

C. Pruett (SEAL) J.P.

THE STATE
VERSUS

After hearing the evidence in the above case it is ordered that the defendant be committeed for said offense. And in default of his giving bond, with good security, in the sum of ..... Dollars for his appearance at the ..... Court, to be held in said County, on the ..... Monday in ..... 19..... that he be committeed to Jail until he be discharged by due process of law.

Witness my hand and seal ..... 19.....

..... (SEAL) J.P.

[fol. 7]

No. 14 Page

WARRANT

THE STATE

VERSUS

Phil Whitus

Charge Murder

John M Moyle Prosecutor

Warrant

Docket 5-1

Examination

Subpoena Witness 11-19-65 DGB

Examination Witness

Search Warrant

Commitment

WITNESS:

Smc as Lynn Davis

Dcsg

Cooper & Burton

[fol. 8] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

INDICTMENT—Filed April 12, 1965

THE GRAND JURORS, selected, chosen and sworn for the County of Mitchell to-wit:

1 C. B. Collins Foreman.

2 D. B. Harrell
3 James Lee Adams
4 John S. Gee
5 [illegible]
6 E. T. Hochliffe
7 [illegible]
8 Drewey Robinson SR
9 J. C. Bellamy JR.
10 Ray Nazworth
11 [illegible]
12 J. C. McGilliard
13 H. C. King
14 John C. Kemper
15 Lee Ann Collins
16 Drewey O. Hayes
17 Clesta A. Scruggs
18 Walter L. Rideau
19 Hayward Snipes
20 Theo Thompson
21 L. T. Hatcher
22 Lewis M. Finlay
23

In the name and behalf of the citizens of Georgia, charge and accuse Leon (Lynn) Davis and Phil Whitus with the offense of Murder for that the said accused, in the County aforesaid, on the 15th day of November in the year of our Lord, Nineteen Hundred and Fifty Nine with force and arms, and unlawfully, did then and there feloniously and with malice aforethought kill and murder, one James Eldridge "Peter" Glenn, by shooting him to death with a pistol; all

contrary to the laws of said State, the good order, peace and dignity thereof.

FRED HAND, JR., Solicitor General

[fol. 9]

WITNESSES FOR THE STATE
Mrs. Peter Glenn (Douglas Townsend)
John M. Maples
Lynwood Williford
Lt. Cecil Franklin
Dr. Herman D. Jones

The Defendant Leon Davis

waive formal arraignment; copy Bill of Indictment, list of witnesses sworn before the Grand Jury, and agree to strike from a panel of 48 Jurors and plead not guilty.

This 12 day of October 1965

B Clarence Mayfield
Defendant's Attorney.

Fred Hand Jr.
Solicitor General.

No. 1229

SUPERIOR COURT
Mitchell County
April Term, 19 65

THE STATE
vs.
Leon (Lynn) Davis
Phil Whitus

Murder

True Bill
Brantley Coleman
Foreman.

FRED HAND, JR., Solicitor General
John M. Maples
Prosecutor.

SPECIAL PRESENTMENT

Received in Open Court from the sworn Grand Jury Bailiff, and filed in office this day of
19 APR 12 1965

Martha B. Hoggard Clerk.
CLERK SUPERIOR COURT

Martha B Hoggard

The Defendant, Phil Whitus having waived formal arraignment; waives copy Bill of Indictment, list of witnesses sworn before the Grand Jury, and agrees to strike from a panel of 48 Jurors and pleads not guilty.

This 19th day of October, 1965.

Walter Jones
Defendant's Attorney

Fred Hand Jr.
Solicitor General

We the Jury find the Defendant Leon (Lynn) Davis guilty.

This 18th day of October 1965

Hendrix Adams
Foreman.

We the Jury find the defendant Phil Whitus guilty

This 19th day of October 1965

A B Neal
Foreman

[fol. 10] [File endorsement omitted]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

October Term, 1965

Case No. 1229

STATE OF GEORGIA

vs.

PHIL WHITUS

CHALLENGE TO THE ARRAY OF PETIT JURORS—Filed October 16, 1965

Your petitioner, PHIL WHITUS, files this his challenge to the array of Petit Jurors selected and now serving on the Petit Jury for the October Term of Superior Court of Mitchell County, Georgia, and shows as follows:

1

The Grand Jury for the April Term of Mitchell County Superior Court has indicted your petitioner for the crime of murder, and it is the intention of the Honorable Fred Hand, Jr., Solicitor General of Mitchell County Superior Court, to try your petitioner before the panel of Petit Jurors summoned for the October Term of the Mitchell County Superior Court.

2

Your petitioner shows that he is a member of the Negro race and has been accused by the State of Georgia of murdering a White farmer in Mitchell County, Georgia.

3

Your petitioner shows that the panel of jurors which will be cast upon your petitioner are illegally and unconstitutionally composed, and they have been drawn and summoned in derogation of the Due Process and Equal Pro-

[fol. 11] tection Clauses of the Fourteenth Amendment of

the Constitution of the United States; and is further in violation of Article One, Paragraphs One and Twenty-five of the Constitution of the State of Georgia of 1945.

4

Your petitioner further shows that the said panel of jurors is illegal and unconstitutional for the following reasons, to wit:

(a) Up until September of 1959 the Jury Commissioners of Mitchell County, Georgia, had not placed a name of any Negro in the jury box and on September of 1959, without revising the jury list, the Jury Commissioners deliberately placed the names of twenty-six Negroes in the jury box, said names being selected with the sole purpose of deliberately placing Negroes' names in the box to meet the constitutional requirements, and said names were not placed by the legal drawing of jurors in a revision of the jury lists as required by law.

(b) On the date of the filing of this challenge no Negro has ever served on a Petit Jury in Mitchell County, Georgia. According to the 1960 Census of Population, Volume 1, Characteristics of the Population, Part 12, Georgia, United States Department of Commerce, or more specifically, Table 27, as it applies to Mitchell County, there is a total population in the county, of persons over 21, 10,208, of which 5,726 are white and 4,480 are colored.

(c) The said panel of jurors which is now cast upon your petitioner contains at least 7 Negroes, but your petitioner [fol. 12] alleges that the revision of the jury list, made in February of 1965, was done solely and exclusively for the purpose of trying your petitioner and one Leon Davis; and said revision is not an honest attempt on the part of the Jury Commissioners to select a panel with no discrimination as to race, color or creed.

(d) Your petitioner contends and alleges that any system designed for the selection of Petit Juries wherein the mechanics of such system make discrimination by race, color or creed a possibility, then any jury selected under such system would of a necessity be unconstitutionally composed. Code Section 59-106 of the Georgia Code Annotated required the Jury Commissioners to select jurors from the

tax digests maintained by the tax receiver. Copy of Section 59-106 is attached hereto, marked Exhibit A, and made a part of this petition. Code Section 92-6307 of the Code of Georgia Annotated requires the tax receiver to maintain his records on a segregated basis, copy of Section 92-6307 attached hereto, marked Exhibit B, and made a part of this petition. Your petitioner further alleges that the tax records in Mitchell County, Georgia, prior to the year 1965, reflect that all returns of Negro tax payers are on yellow pages and all returns of White tax payers are on white pages. During the year 1965 the pages were identical in color, however, the returns of Negro tax payers were marked "colored." The Jury Commissioners, in their revision of the jury list in February 1965, used the tax digests of Mitchell County from which to select all of the Petit Jurors.

[fol. 13] (e) Your petitioner further alleges that under the law in force in the State of Georgia at the time of the filing of this petition the Jury Commissioners are required to select upright and intelligent men to serve as jurors and that this requirement establishes on its face and in its application a nonascertainable standard for jury selection and is void for vagueness.

(f) Your petitioner further alleges that the statutory process for the selection of the names of Petit Jurors and the manner in which said Petit Jurors in Mitchell County, Georgia, were selected has resulted in the systematic exclusion and inclusion of Negroes on the juries in Mitchell County, Georgia, all of which are in violation of the Due Process of Law and Equal Protection of Law clauses of the Fourteenth Amendment of the Constitution of the United States and the guarantees of Article III, Section 2, and the Fifth, Sixth and Seventh Amendments of said Constitution.

Wherefore, the said Phil Whitus prays that his challenge to the array be inquired into and that said array be quashed, and that the said Phil Whitus have such and other relief as will meet the ends of equity and justice.

This — day of October, 1965.

——, ——; Attorney for Petitioner.

P. O. Box 1115, Albany, Georgia.

[fol. 14] EXHIBIT A TO CHALLENGE TO THE ARRAY OF PETIT JURORS

of the proceedings and deliberations of the jury commissioners unless compelled to testify thereof in some court in this State. (Acts 1878-9, p. 28; 1882-3, p. 101.)

New trial: Failure of clerk to take and subscribe oath can be taken advantage of by challenge to array of grand jurors or by plea in abatement to undictment such question cannot be raised by motion for new trial. 152-229. —— (109 S. E. 664).

59-105. (1138 P. C.) Same; compensation of commissioners and clerk for revising jury lists.—Jury commissioners shal receive $2 each day for every day's service in revising the jury lists, to be paid from the county treasury. The clerk of the board shall receive $3 for each day's service, to be paid in like manner. (Acts 1878-9, p. 27; 1880-1, p. 124.)

Editorial Note.—This section was amended or modified by Acts 1921, p. 209, 1922, p. 132, 1925, p. 216, 1947, p. 146, 1927, p. 222, 1929, p. 182, and 1929, p. 277, as it relates to certain counties. These amendments have not been codified because of the limitations upon the number of counties in which they apply. Some of them probably violate Const., Art. I, Sec. IV. Par. 1 (§ 2-401), prohibiting the enactment of a special law in any case for which provision has been made by an existing general law. On this question, see 103-701 (30 S. E. 627); 135/269 (69 S. E. 182); 139/117 (76 S. E. 747); 146/576 (91 S. E. 671); 150/583 (104 S. E. 418). The 1921 Act prescribed a fee of $10 a day for jury commissioners for revising the jury list in counties having a population of 200,000 or more. The 1922 Act reduced this fee to $6 a day. Acts 1925, p. 216, prescribed $5 a day as the compensation for each of the jury commissioners and their clerks for revising the jury list in counties "having a population according to the United States census of 1920 of not less than 39,837 and not more than 39,845." Acts 1927, p. 146, made the same provision as to counties "having a popu-

lation, according to the United States census of 1920 of not less than 33,000 and not more than 33,050." Acts 1927, p. 222, prescribed $10 a day for jury commissioners and their clerks in revising jury lists in counties having a population according to the United States census of 1920 or any future census, of 200,000 or more. Acts 1929, p. 182, prescribed $5 a day instead of $2 as the compensation for jury commissioners and their clerks in counties "having a population, according to the United States census of 1920, of not less than 26,108 and not more than 26,110." Acts 1929, p. 277, made the same provision as to counties "having a population according to the United States census of 1920 of not less than 18,355 and not more than 18,365."

59-106. (816, 819 P. C.) Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1887, p. 31; 1892, p. 61; 1899, p. 44.)

[fol. 15] EXHIBIT B TO CHALLENGE TO THE ARRAY OF PETIT JURORS

copy of the revised and corrected digest to the State Revenue Commissioner, one to the ordinary or other authority having charge of county affairs, and one to the tax collector. (Acts 1851-52, p. 291; 1913, p. 123.)

Cross-references.—When time shall be granted to receivers and collectors, see § 92-7108. Penalty for receivers failing to complete digest, see § 92-5401.

Cited. 152-266 (1-a), (109 S. E. 654).

Evidence: Digests are on trial of an issue as to payment of taxes, 47/90; See 3 App. 206 (1) (59 S. E. 718).

92-6304. (1094) Form and size of digests: binding and labeling.—The receivers of tax returns in making the digests shall conform to the forms furnished and each digest shall be of uniform size, and when returned shall be bound and labeled. (Acts 1845, Cobb. 1076. Acts 1913, p. 123.)

Cited. 152/266 (1-a) (109 S. E. 654).

92-6305. (1095). Returns, how entered in digests.—Land and interests in land, together with the returns of personal estate and other interests the subject of taxation, shall be returned and set down in the digest in separate columns according to the classification furnished the receivers by the State Revenue Commissioner in each year, and their aggregate value extended. (Acts 1851-52, p. 290.)

Cross-reference.—Penalty for receiver's failing to make a proper digest, see § 92-5402.

92-6306. (1085) Names to be entered on digests in full.—Receivers of tax returns shall enter on their digests the first name in full of all taxpayers. (Acts 1876, p. 15.)

Cross-reference.—Penalty for incomplete or improper digest, see §§ 92-5401 to 92-5403.

92-6307. (1086) Entry on digest of names of colored persons.—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest. (Acts 1894, p. 31.)

Editorial Note.—Acts 1935, p. 476, requires the tax receivers in all counties in this State having a population of 200,000 or more by the United States census of 1930, or any future United States census, to list in the white, and colored tax digests respectively the names of the taxpayers in continuous, alphabetical order without segregation by militia districts or other local subdivisions except independent school districts.

Acts 1937-38, Extra Sess., p. 185 provides that the tax receivers of all counties having population of not less than 70,000 nor more than 100,000, by the census of 1930, or any future census, are required to list in the white and colored digests, respectively, the names of the taxpayers in continuous alphabetical order according to the names of the taxpayers, without segregation by militia districts or other local subdivisions.

92-6308. (1116) Returns by receivers and collectors of taxes paid by colored people. The several receivers of tax returns and tax collectors in this State, or other officers performing similar duties, shall make a report to the State Revenue Commissioner of the character and amount

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[fol. 16] *Duly sworn to by Phil Whitus jurat omitted in printing.*

[fol. 17] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Number 1229

STATE OF GEORGIA,

vs.

PHIL WHITUS

SENTENCE—Filed October 19, 1965

The jury having returned a verdict of guilty, without a recommendation of mercy, it is considered, ordered and adjudged by the court that the defendant, PHIL WHITUS, be taken from the bar of this court to the common jail of Mitchell County, Georgia, to be held there until the sheriff of said County and his lawful deputy and a sufficient guard shall in the manner and within the time prescribed by law, take the defendant PHIL WHITUS, to the penitentiary of this State, where, it is ordered, that within the walls of said penitentiary, that the defendant on the 10th day of December, 1965 be put to death by electrocution as provided by law.

There shall be present at such execution the Warden of the penitentiary, who shall serve as executioner, and at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and if the condemned person so desires, his counsel, relatives and such clergymen and friends as he may request.

PHIL WHITUS, may God have mercy on your soul.

In open court, this October 19, 1965.

Carl E. Crow, Judge Superior Court, South Georgia Judicial Circuit.

[File endorsement omitted.]

[fol. 18] CLERK'S CERTIFICATE

I, Martha B. Hoggard, Clerk Superior Court, Mitchell County, Georgia, do hereby certify that the Notice of Appeal and the Amendment thereto contained herein is the original Notice of Appeal and Amendment filed in this office, and that the other items contained herein are true and complete copies of their originals.

I further certify that the defendant is confined in jail pending appeal.

WITNESS my hand and the seal of this office, this 19 day of January, 1966.

Martha B. Haggard, Clerk Superior Court, Mitchell County, Georgia.

[Seal.]

[fols. 19-20] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Number 1229

THE STATE,

vs.

PHIL WHITUS

INDICTMENT FOR MURDER

Transcript of Hearing on Challenge to the Array of Petit Jurors

Before his honor, CARL E. CROW, October 16, 1965.

APPEARANCES:

Fred Hand, Jr., Solicitor General, South Georgia Judicial Circuit, Pelham, Georgia, For the State.

P. W. Jones, Attorney at Law, Albany, Georgia, For the Defendant.

[File endorsement omitted.]

[fol. 21] STIPULATION

P. W. Jones: In the case of Phil Whitus vs. The State of Georgia, according to the best recollection of the clerk there were 90 jurors summoned, 4 white jurors were excused, and there were 7 Negroes on the panel of jurors, but there could possibly be more.

Solicitor Hand: And that there is no designation of race indicated on the official list of jurors; and that the clerk makes the statement regarding the 7 Negro jurors thru her personally knowing these individuals and on no other basis.

P. W. Jones: Mr. Hand and I have agreed to excuse Mr. Robert Culpepper and in lieu of his testimony we have stipulated that his testimony on a former hearing on the challenge to the array of grand and petit jurors shall be used in lieu thereof.

Solicitor Hand: Only so far as it relates to the petit jury.

Reporter: Shall I pick out the pertinent questions?

P. W. Jones: Mr. Hand and I will pick out the questions.

Solicitor Hand: And in case of a disagreement, the court will make the final determination.

I would like for the record to reflect that the defendant, Phil Whitus, is in open court and has been from the inception of all these stipulations and agreements, and that he is represented by his counsel, P. Walter Jones.

P. W. Jones: I acknowledge that my client is present and fully cognizant of what is going on, and is represented by me. Your honor, I have subpoenaed Mr. Campbell, [fol. 22] who is a little older than I am, to bring two of his books, and I would like for someone to go down and bring those books up. While we are waiting on Mr. Campbell, I explained to Mr. Hand that I inadvertently left the 1960 United States Census at my house and he has agreed that the same testimony introduced at the last term of court, and which this court can take judicial cognizance of, could be entered, subject to my filing the book in the clerk's office no later than next week.

Solicitor Hand: Provided that the evidence you intend to substantiate this with is properly authenticated as required by Georgia law and the rules of evidence.

P. W. Jones: Your honor, we do not plan to properly au-

thenticate it. We only plan to introduce the book as it is, and I believe the last decision of the Court of Appeals affirmed your honor's decision and said nothing about authentication. It merely said the court could take judicial cognizance of the 1960 census. This census, which I plan to file with the clerk's office, shows that there are in Mitchell County over the age of 21, 10,206 people, of which 5,726 are white and 4,480 are colored.

Solicitor Hand: Do you agree that in the event you do not bring forth this evidence from which you have read, it will be stricken from the record?

P. W. Jones: It can be stricken from the record if I do not file the book next week. Barring sickness, I will.

[fol. 23] W. H. CAMPBELL, SWORN.

Direct examination.

By: P. W. Jones:

Q. State your name and position, Mr. Campbell.

A. W. H. Campbell, Tax Receiver.

Q. Mr. Campbell, prior to the year 1965, you were in control of the tax digest for Mitchell County, Georgia?

A. Yes sir.

Q. You had two classes of taxpayers, colored and white?

A. Yes.

Q. Did the white taxpayers make their returns on white sheets?

A. Yes.

Q. And did the colored taxpayers make their returns on yellow sheets?

A. Yes sir.

Q. And that has been the practice of your office operating under a State law——

Solicitor Hand: Your Honor, I object to this line of questioning. It would appear to me that the sole issue involved here today to be considered by this court and any future courts is whether or not the petit jury which is cast upon the defendant in this case has been constitutionally selected, and whether the tax list from which this petit jury by law was drawn is of a constitutional nature. What has gone on in years gone by would apparently be irrelevant.

P. W. Jones: If your Honor please, I intend to show [fol. 24] by tax commissioner Grogan that they used the 1964 tax digest, and one of the allegations in our petition is that under the existing laws in the State of Georgia, and according to recent decisions of the Supreme Court of the United States that if Mr. Campbell follows the letter of the law he cannot select a constitutional jury, because he has sworn to maintain the tax digest on a segregated basis. The tax list that we are concerned with now was taken from his 1964 records and was drawn in February 1965, and therefore, the 1964 records would of a certainty be admissible in this hearing.

Solicitor Hand: Your Honor, as a matter of procedure,

would it not be more appropriate if Mr. Jones would first lay the foundation for this challenge by putting the jury commissioner on the stand to determine what they did in fact do.

The Court: I will let him do it anyway he wants to.

Q. Mr. Campbell, prior to 1965 the negro taxpayers were kept on yellow sheets?

A. Yes sir.

Q. And the white taxpayers were kept on white sheets?

A. Yes.

Q. Were you under instructions from any State official to maintain your records that way?

A. Well, I guess that's the way they always had done it.

[fol. 25] Cross-examination.

By Solicitor Hand:

Q. Mr. Campbell, you don't know what procedure the jury commissioners used in selecting any jurors for Mitchell County, do you?

A. No.

P. W. Jones: I would like to call Mr. Grogan to the stand.

Mr. Grogan, Sworn

Direct examination.

By P. W. Jones:

Q. Mr. Grogan, are you a tax commissioner?

A. No.

Q. Are you a jury commissioner?

A. Yes sir.

Q. How many jury commissioners are there in this county?

A. Six, I think.

Q. You have met with those six jury commissioners?

A. Yes sir.

Q. Are all of those jury commissioners white people?

A. Yes.

A. Yes.

Q. Now, Mr. Grogan, when did y'all revise the jury list?

A. February of this year.

Q. February of this year?

A. Yes sir.

[fol. 26] Q. What records, if any, did you use in revising that list?

A. Well, we used the tax digest.

Q. You used the tax digest. The one maintained by Mr. Campbell?

A. Yes sir.

Q. The law enforces upon you, Mr. Grogan, the duty of selecting the most intelligent and upright citizens. How did you accomplish that duty imposed upon you by law?

A. Well, we selected the ones from our communities, each individual community, the ones that we knew personally.

Q. The ones you personally knew? You didn't give any taxpayers any intelligence tests, did you?

A. No.

Q. You didn't call them in to talk to them?

A. No.

Q. Did you attempt to get their record, if they had any criminal record?

A. No, we didn't.

Q. What community do you reside in the county?

A. Pebble City.

Q. You were familiar with the residents of Pebble City?

A. Yes sir.

Q. And the adjacent farms?

A. Yes.

Q. Now, Mr. Grogan, you of necessity know more white taxpayers than you do colored taxpayers, do you not?

A. Yes, I do in that community.

Q. And the jurors from the Pebble City Community were more or less left up to your discretion?

A. Yes.

[fol. 27] Cross-examination.

By Solicitor Hand:

Q. Mr. Grogan, at the time the jury commissioners met in February of this year, was it your intention to revise this list in view of a case that the Judge brought to your attention?

A. He advised us to revise the jury list.

Q. In doing so did you purposely include or exclude anyone on the revised jury list because of their race, creed, or national origin?

A. No.

Q. Did you personally practice any discrimination because of anyone's race, creed or national origin?

A. We didn't.

Q. You didn't revise this jury list for the sole and exclusive purpose that the State might try Phil Whitus, did you?

A. No, I did not.

Q. Did you, if in fact the tax list of Mitchell County, Georgia, was segregated, allow this to effect your decision in anyway as to whether or not you would take a prospective man as a prospective juror?

A. No.

Q. Did you purposely include or exclude anyone from a segregated tax digest, if in fact there was a segregated tax digest?

A. No.

Q. In relation to the standards which you applied in selecting the most intelligent and upright jurors for prospec-
[fol. 28] tive jury duty, I believe you testified that you tried to abide by the Georgia law in selecting the most intelligent and upright citizens in the community, and you did it on the basis of personal knowledge of the individuals. Is that correct?

A. That's correct.

Q. Although you might personally know, for example, Joe Doe from Pebble City, would your recommendations in relation to this juror be final, or would the entire jury commission pass on each individual prospective juror?

A. The entire commission passed on each individual juror.

Q. In other words, you would only make the recommendation as to whether an individual would be qualified?

A. That's right.

Q. Mr. Grogan, I ask you a further question—in examining the prior tax digest, that is prior to 1964, did you determine whether or not the number of negroes making tax returns was as great or nearly as great as white people making tax returns in Mitchell City?

A. In the book we had it wasn't as big a list.

Q. What percentage—in years gone by what would you say the percentage of negro tax returns was to the overall tax return?

A. It would be about thirty per cent, I guess.

Q. That would be your guess.

P. W. Jones: I object to years gone by. I have no objection to 1964, because he testified the jury list was made up from the 1964 tax digest, and I think only that tax digest is admissible here.

[fol. 29] The Court: I will let it go in.

P. W. Jones: Your Honor, I have two questions to ask and I talked with Mr. Hand the other night and will probably require Mr. Grogan to refer to his volume report, and if Mr. Hand has no objection I would like to ask these questions and have Mr. Grogan report his answers at a later date. I would like to inquire of Mr. Grogan how many jurors are on the jury list and how many of those jurors are colored.

Solicitor Hand: Your Honor, I submit that the witness can answer to his own personal knowledge.

Redirect examination.

By: P. W. Jones:

Q. Of your own personal knowledge, without examining those records, Mr. Grogan, can you tell me approximately how many jurors are on the list?

A. On the list now?

Q. Yes.

A. There's around six hundred.

Q. I'll ask you of your own personal knowledge approximately how many of those jurors are colored?

A. I'm afraid I couldn't.

P. W. Jones: Would you allow him to go get this information, rather than continue this hearing?

Solicitor Hand: Your Honor, I think one further question might clarify counsel's request.

[fol. 30] Recross-examination.

By Solicitor Hand:

Q. Mr. Grogan, the list that y'all composed of all jurors in Mitchell County, does it have any designation of race on that list?

A. After we had completed it, it didn't have any.

Q. It had no designation of race?

A. No.

Q. Therefore, you would be unable to determine who was a negro and who was not a negro from that list, unless you just happened to personally know them. Is that true?

A. That's true.

Solicitor Hand: I would submit, your Honor, that it is impossible for Mr. Grogan to furnish this information.

Redirect examination.

By: P. W. Jones:

Q. Mr. Grogan, you said after it was completed. While it was being accomplished or making up the list, did you have a designation showing which ones were negroes?

A. Well, we knew which was a negro and which wasn't when we recommended him.

Q. All of the recommendations of the various jury commissioners were acted upon favorably, were they not?

A. Yes sir.

Q. So at the time you were making up the list you knew how many jurors there were and how many of those jurors were negroes, and do you have that information?

[fol. 31] A. We didn't tally them that way.

Q. Would you have any approximate idea when the recommendations were made at that time as to how many were negroes?

A. I'd have to guess at it.

Q. Well, would you give us a reasonable guess?
A. Twenty five or thirty per cent, I guess.

Recross-examination.

By: Solicitor Hand:

Q. Mr. Grogan, is this just a wild guess by you?
A. Yes sir.
Q. Could it be as high as eighty per cent or sixty per cent?
A. Well, it could possibly be different.
Q. You just don't really know, do you?
A. I don't know.
Q. You don't know really what the percentage is, do you?
A. No, I'm not sure.

Redirect examination.

By: P. W. Jones:

Q. But to your best knowledge it was twenty five or thirty per cent?
A. Well, just guessing at it, that's right.

Recross-examination.

By: Solicitor Hand:

Q. And you could just as well guess there could be as many as forty or fifty per cent?
A. Well, I could, yes sir.

[fol. 32] Redirect examination.

By: P. W. Jones:

Q. When I first asked you the question, Mr. Grogan, if you had sincerely thought there were fifty per cent, you would have said so, wouldn't you?
A. Well, if I had thought that, I would, but this is just a guess.
Q. In other words, your reasonable guess and as a member of the jury commission, there was only twenty five or thirty per cent?

A. I guess so.

P. W. Jones: Your honor, subject to the introduction of the 1960 United States Census records, we rest.

Plaintiff Rests

Recross-examination.

By: Solicitor Hand:

Q. Mr. Grogan, did you as jury commissioner participate in selecting twenty six negroes in the jury box?

A. The ones present in the box?

Q. Yes. Did you purposely put twenty six in there?

A. Not purposely, no.

[fol. 33] P. W. Jones: Your honor, may I reopen my case for brief testimony on my behalf?

The Court: All right.

P. W. Jones, Sworn.

Statement by P. W. Jones.

My name is P. Walter Jones, Attorney at Law, in Albany, Georgia, and I would like to testify what I consider an admission in judiciary. I was present at a habeas corpus hearing in Brunswick, Georgia, where Honorable Maston O'Neal introduced an affidavit, in which——

Solicitor Hand: Your Honor, I object——

The Court: Let's see what it is.

P. W. Jones (continuing):

an affidavit in which the affidavit said that Mr. Burson, who is head of the Jury Commissioners,—Mr. Burson gave an affidavit to the effect that in November of 1959 he had revised the jury list and the names of 26 negroes were included. That was done in open court and was part of the court record, which I believe is an admission in judicio and of which this court can take judicial notice.

Solicitor Hand: Your Honor, I object to this testimony. The evidence shows the commissioners revised the list in 1965.

P. W. Jones: February 1965, and I put that in only because Mr. Hand asked a question about it.

Cross-examination.

By: Solicitor Hand:

Q. Mr. Jones, you don't mean to imply to the Court that this has anything to do with the present petit jury, do you? [fol. 34] A. No sir.

Q. You don't mean to imply that sub-paragraph (a) of paragraph 4 of your petition has anything at all to do with the present—

A. That I will not admit, Mr. Hand, but I will admit that the jury list I am referring to now, which we are challenging, is not the jury list which will be cast upon this defendant. If you will withdraw the question about the 26 jurors, I will withdraw this.

Q. It is in your petition, so I can't. I will be glad to if you will strike paragraph 4 of your petition in its entirety.

Reporter: Has the judge ruled on the objection to the testimony?

P. W. Jones: We are going to let my testimony stand. The judge has ruled that it is not admissible.

Q. You don't have any personal knowledge that the revision of the jury list of Mitchell County, Georgia, made in February of 1965 was done solely and exclusively for the purpose of trying Phil Whitus do you?

A. I do not.

Q. You do not have any information to reveal to the Court that this was not an honest attempt on the part of the jury commissioners to select a panel in which no discrimination as to race, color or creed was performed, do you?

A. I cannot answer that question, Mr. Hand.

Q. In sub-paragraph (c) of paragraph 4 of your petition [fol. 35] you allege in part, "and said revision is not an honest attempt on the part of the jury commissioners to select a panel with no discrimination as to race, color or creed." My question is as follows: Do you have anything

to substantiate an implication that this was not an attempt on the part of the jury commissioners?

A. Only from the evidence submitted this morning.

Q. That is the only evidence you have?

A. Yes sir.

Plaintiff Rests

W. A. Cain, Sworn.

Direct examination.

By: Solicitor Hand.

Q. State your name, please.

A. W. A. Cain.

Q. Are you a jury commissioner of Mitchell County, Georgia?

A. I am.

Q. Were you present when the jury list was revised in February 1965?

A. I was.

Q. Will you relate to the Court the procedure you gentlemen used in revising this list, please?

A. First I believe we went thru the existing jury list, striking off the deceased and the ones who had moved away. Then we took the 1964 tax digest and went thru it with each individual commissioner making recommendations from [fol. 36] his home locality, and each selection being passed on by all commissioners and each commissioner being given a chance to object to each recommendation.

Q. Then did the jury commission as a whole pass on each individual prospective juror?

A. That's correct.

Q. If in fact there is some designation on the 1964 tax digest for this county of race, did this or did it not effect your selection of any prospective juror?

A. It did not.

Q. Did you or any other member of the jury commission, to your personal observation and knowledge, practice any discrimination in regard to race, color, creed or national

origin in selecting any prospective juror for the present jury panel?

A. No sir.

Q. Do you have any idea of your own how many negroes are in the jury box of Mitchell County at this time?

A. I do not.

Q. Do you have any idea what percentage of tax returns are made by negroes on the Mitchell County Digest?

A. I do not.

Q. Do you know how many jurors are in the jury box in Mitchell County?

A. If I remember right somewhere between 500 and 600, in the upper 500's. It's in the vicinity of 600, total, I believe.

Q. In the selection of prospective jurors did the jury commissioners try to use the guideline the most intelligent and upright citizens they personally knew?

[fol. 37] A. In my case we did, and I suppose that the other commissioners did.

Cross-examination.

By: P. W. Jones:

Q. You said between 500 and 600. Was that your total jury list?

A. I think that's right.

Q. That does not represent the number of negroes?

A. That represents the total list.

Q. You were using the Tax Digest, were you not?

A. Yes, sir.

Q. The negro taxpayer returned theirs on yellow sheets?

A. We did not use the tax returns. We used the Tax Digest.

Q. On the Tax Digest they are marked "colored" and "white" are they not, or are they kept in separate sections?

A. Correct.

Q. The law casts upon you the duty to select the most intelligent and upright citizens. How do you proceed to do that? Did you give tests of their intelligence?

A. No sir, we did not.

Q. Did you check criminal records?

A. No sir.

Q. It was done, more or less, by knowledge of the jury commissioners?

A. Yes sir.

Q. All of the jury commissioners are white, are they not?

A. Yes sir.

Q. And each jury commissioner would take his section of the county and make his recommendations to the jury [fol. 38] commission as a whole, and those recommendations were followed?

A. In most cases. I don't know of a deviation, but it's possible there could have been.

Redirect examination.

By Solicitor Hand:

Q. The jury list that the commissioners ultimately composed, did it have any designation of race on it?

A. It does not.

Solicitor Hand: The state rests.

P. W. Jones: We close, subject to my tendering into court the 1960 United States census record.

Solicitor Hand: The state closes.

The Court: The court overrules the motion and the case will be taken up next week.

STIPULATION—October 19, 1965

[fol. 39] It is stipulated and agreed between the state of Georgia and P. Walter Jones, attorney for Phil Whitus, that a document has been brought into court, which is labeled as follows: the eighteenth decennial census of the United States, census of population: 1960, volume 1, characteristics of the population, number of inhabitants, general population characteristics, general social and economic characteristics, and detailed characteristics, part 12 Georgia, prepared under the supervision of Howard G. Brunsman, chief, population division, U. S. Department of Commerce, Luther H. Hodges, Secretary, Bureau of the Census, Richard M. Scammon, director (from May 1, 1961), Robert W. Burgess, director (to March 4, 1961).

And the State of Georgia renews the objection to the introduction of this evidence on the ground that the same has not been properly authenticated.

It is further stipulated that the only pertinent portion of this book is found on page 12-123, and that a photostatic copy of said page and the frontispiece will suffice.

[fol. 40] The Eighteenth Decennial Census of the United States

Census of Population: 1960

Volume I

CHARACTERISTICS OF THE POPULATION

Number of Inhabitants, General Population Characteristics, General Social and Economic Characteristics, and Detailed Characteristics

Part 12

GEORGIA

Prepared under the supervision of HOWARD G. BRUNSMAN, *Chief, Population Division*

U.S. DEPARTMENT OF COMMERCE
LUTHER H. HODGES, *Secretary*

BUREAU OF THE CENSUS

RICHARD M. SCAMMON, *Director* (from May 1, 1961)
ROBERT W. BURGESS, *Director* (to March 3, 1961)

[fol. 41]

Table 27.—AGE BY COLOR AND SEX, FOR COUNTIES: 1960—Con.

[Median not shown where base is less than 100]

AGE	1960 POPULATION							1950 POPULATION, TOTAL
	ALL CLASSES			WHITE		NONWHITE		
	TOTAL	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	
	MITCHELL							
ALL AGES	19 652	9 393	10 259	4 664	4 967	4 729	5 292	22 528
UNDER 1 YEAR	517	248	269	83	90	165	179	626
1 YEAR	466	246	220	95	88	151	132	1 256
2 YEARS	515	270	245	93	79	175	166	
3 YEARS	492	240	252	83	92	157	160	1 273
4 YEARS	486	257	229	92	85	165	144	
5 YEARS	532	272	260	106	93	166	167	567
6 YEARS	480	237	243	95	104	142	139	566
7 YEARS	507	257	250	108	97	149	153	
8 YEARS	467	234	233	101	95	133	138	1 675
9 YEARS	486	227	259	88	95	139	164	
10 YEARS	497	269	228	108	99	161	129	
11 YEARS	483	231	252	110	102	121	150	2 020
12 YEARS	508	232	276	114	119	118	157	
13 YEARS	506	256	250	115	125	141	125	
14 YEARS	396	195	201	97	95	98	106	489
15 YEARS	445	208	237	92	119	116	118	438
16 YEARS	427	213	214	114	107	99	107	873
17 YEARS	416	204	212	100	96	104	116	
18 YEARS	316	166	150	69	68	97	82	791
19 YEARS	274	120	154	52	51	68	103	
20 YEARS	230	105	125	41	44	60	81	346
21 AND OVER	10 206	4 706	5 500	2 702	3 024	2 004	2 476	11 648
UNDER 5 YEARS	2 476	1 261	1 215	448	434	813	781	3 155
5 TO 9 YEARS	2 472	1 227	1 245	498	484	729	761	2 808
10 TO 14 YEARS	2 390	1 183	1 207	544	540	639	667	2 509
15 TO 19 YEARS	1 878	911	967	627	661	484	526	2 062
20 TO 24 YEARS	1 070	511	559	232	231	279	328	1 651
25 TO 29 YEARS	940	441	539	230	269	211	270	1 467
30 TO 34 YEARS	1 002	461	541	242	270	219	271	1 408
35 TO 39 YEARS	1 055	488	567	298	312	190	255	1 496
40 TO 44 YEARS	1 119	506	613	292	357	214	256	1 282
45 TO 49 YEARS	1 135	551	584	340	326	211	258	1 044
50 TO 54 YEARS	967	451	516	286	314	165	202	892
55 TO 59 YEARS	784	367	417	220	236	147	181	731
60 TO 64 YEARS	673	308	365	191	208	117	157	632
65 TO 69 YEARS	616	266	350	145	192	121	158	578
70 TO 74 YEARS	493	227	266	134	165	93	101	387
75 TO 79 YEARS	293	127	166	76	106	51	60	365
80 TO 84 YEARS	149	65	84	41	50	24	34	
85 AND OVER	100	42	58	20	32	22	26	61
UNDER 18 YEARS	8 626	4 296	4 330	1 796	1 780	2 500	2 550	9 783
65 AND OVER	1 651	727	924	616	545	311	379	1 391
MEDIAN AGE	22.9	21.1	24.4	29.0	31.6	16.9	19.2	22.2
	MONTGOMERY							
ALL AGES	6 284	3 159	3 125	1 687	1 847	1 272	1 278	7 901
UNDER 1 YEAR	149	73	75	33	33	40	42	199
1 YEAR	135	69	66	31	26	38	40	399
2 YEARS	126	75	51	28	11	47	40	
3 YEARS	131	78	53	36	24	42	29	394
4 YEARS	141	71	70	31	24	40	46	
5 YEARS	142	69	73	31	35	38	38	205
6 YEARS	122	66	56	39	24	27	32	176
7 YEARS	136	66	70	32	37	34	33	
8 YEARS	137	76	61	34	25	42	36	553
9 YEARS	136	65	71	36	30	29	41	
10 YEARS	145	72	73	32	44	40	29	
11 YEARS	131	60	71	35	30	25	41	743
12 YEARS	150	71	79	44	42	27	37	
13 YEARS	137	72	65	33	46	39	19	
14 YEARS	140	75	65	45	32	30	33	180
15 YEARS	156	77	79	40	40	37	39	186
16 YEARS	123	69	54	40	28	29	26	347
17 YEARS	140	65	75	40	43	25	32	
18 YEARS	136	67	69	46	39	21	30	275
19 YEARS	137	66	71	47	47	19	24	
20 YEARS	102	57	45	40	30	17	15	95
21 AND OVER	3 433	1 700	1 733	1 114	1 157	586	576	4 149
UNDER 5 YEARS	681	346	335	159	118	207	197	992
5 TO 9 YEARS	673	342	331	172	151	170	180	934
10 TO 14 YEARS	703	350	353	189	194	161	159	923
15 TO 19 YEARS	692	344	348	213	197	131	151	808
20 TO 24 YEARS	414	224	190	135	111	89	79	487
25 TO 29 YEARS	298	160	138	90	83	70	55	495
30 TO 34 YEARS	279	156	123	90	71	66	52	495
35 TO 39 YEARS	305	148	157	105	112	43	45	569
40 TO 44 YEARS	389	190	199	121	140	69	59	617
45 TO 49 YEARS	435	193	242	139	157	54	85	559
50 TO 54 YEARS	332	174	158	118	112	56	46	515
55 TO 59 YEARS	278	144	134	103	97	41	37	272
60 TO 64 YEARS	229	104	125	69	82	35	43	224
65 TO 69 YEARS	203	91	112	59	85	32	27	243
70 TO 74 YEARS	162	72	90	55	61	17	29	156
75 TO 79 YEARS	118	51	67	36	47	15	20	162
80 TO 84 YEARS	51	26	25	20	19	6	6	
85 AND OVER	42	24	18	14	10	10	8	30
UNDER 18 YEARS	3 476	1 769	1 707	840	874	929	833	3 382
65 AND OVER	576	244	332	184	222	80	90	591
MEDIAN AGE	26.7	24.0	29.9	29.2	34.9	18.7	18.4	23.0

AGE	1960 POPULATION							1950 POPULATION, TOTAL
	ALL CLASSES			WHITE		NONWHITE		
	TOTAL	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	
	MONROE							
ALL AGES	10 495	4 897	5 598	2 480	2 935	2 417	2 663	10 523
UNDER 1 YEAR	247	123	124	31	42	92	82	232
1 YEAR	224	114	110	52	37	62	73	515
2 YEARS	249	108	141	47	56	61	87	
3 YEARS	232	107	125	52	48	55	77	513
4 YEARS	218	97	121	37	48	60	73	
5 YEARS	256	121	135	58	53	63	82	224
6 YEARS	243	124	119	54	48	70	71	235
7 YEARS	264	132	132	56	51	76	81	
8 YEARS	247	115	132	52	60	63	72	646
9 YEARS	244	119	125	50	54	69	71	
10 YEARS	256	122	134	57	52	65	82	
11 YEARS	246	125	121	48	49	77	72	911
12 YEARS	227	111	116	52	47	59	69	
13 YEARS	236	113	123	64	67	49	56	
14 YEARS	235	135	100	62	43	73	57	204
15 YEARS	192	97	95	50	43	47	52	216
16 YEARS	211	100	111	42	48	58	63	466
17 YEARS	209	96	113	42	58	54	55	
18 YEARS	223	72	151	23	114	49	37	423
19 YEARS	231	80	151	36	112	44	39	
20 YEARS	200	81	119	34	75	47	44	189
21 AND OVER	5 605	2 605	3 000	1 461	1 732	1 124	1 268	5 729
UNDER 5 YEARS	1 170	549	621	219	229	330	392	1 280
5 TO 9 YEARS	1 254	611	643	270	266	341	377	1 109
10 TO 14 YEARS	1 200	606	594	283	258	323	336	1 115
15 TO 19 YEARS	1 066	445	621	193	375	252	246	1 105
20 TO 24 YEARS	709	302	407	128	228	174	179	822
25 TO 29 YEARS	553	267	286	123	128	144	158	682
30 TO 34 YEARS	566	262	304	138	169	128	135	663
35 TO 39 YEARS	581	275	306	130	160	125	146	644
40 TO 44 YEARS	596	299	297	169	173	130	124	549
45 TO 49 YEARS	547	249	298	147	171	102	127	466
50 TO 54 YEARS	523	246	277	155	175	91	102	479
55 TO 59 YEARS	440	207	233	137	156	70	77	401
60 TO 64 YEARS	347	160	187	110	118	50	69	319
65 TO 69 YEARS	338	158	180	93	106	65	74	352
70 TO 74 YEARS	266	112	154	67	87	45	67	227
75 TO 79 YEARS	186	84	102	60	78	24	24	233
80 TO 84 YEARS	90	40	50	30	32	10	18	
85 AND OVER	63	25	38	12	26	13	12	41
UNDER 18 YEARS	4 236	2 059	2 177	906	982	1 153	1 275	4 182
65 AND OVER	943	419	524	262	329	157	195	853
MEDIAN AGE	23.9	23.9	23.9	30.9	29.4	19.3	19.6	24.0
	MORGAN							
ALL AGES	10 280	4 960	5 320	2 613	2 747	2 347	2 573	11 899
UNDER 1 YEAR	270	139	131	53	60	86	71	315
1 YEAR	245	120	125	49	61	71	64	614
2 YEARS	226	122	104	49	43	73	59	
3 YEARS	280	148	132	68	52	80	80	660
4 YEARS	239	118	121	56	47	62	74	
5 YEARS	247	112	135	42	61	70	74	313
6 YEARS	243	125	118	48	54	77	64	284
7 YEARS	251	135	116	65	50	70	66	
8 YEARS	232	115	117	50	56	65	61	871
9 YEARS	243	119	124	50	57	69	67	
10 YEARS	248	124	124	61	47	63	77	
11 YEARS	243	135	108	58	48	77	63	1 097
12 YEARS	266	153	113	78	46	79	67	
13 YEARS	257	136	121	69	52	67	69	
14 YEARS	236	102	134	50	51	52	83	253
15 YEARS	229	123	106	62	43	61	63	248
16 YEARS	202	94	108	41	53	53	55	411
17 YEARS	239	107	132	53	67	54	65	
18 YEARS	147	76	71	36	33	40	38	357
19 YEARS	130	74	56	35	22	39	34	
20 YEARS	133	79	54	36	25	43	29	154
21 AND OVER	5 474	2 504	2 970	1 508	1 720	996	1 250	6 320
UNDER 5 YEARS	1 260	647	613	275	265	372	348	1 589
5 TO 9 YEARS	1 216	606	610	255	278	351	332	1 470
10 TO 14 YEARS	1 250	650	600	312	241	338	359	1 350
15 TO 19 YEARS	947	474	473	227	218	247	255	1 016
20 TO 24 YEARS	563	283	280	138	139	145	141	710
25 TO 29 YEARS	490	214	276	136	154	78	122	788
30 TO 34 YEARS	473	236	237	145	133	91	104	744
35 TO 39 YEARS	576	280	296	166	165	114	131	736
40 TO 44 YEARS	551	248	303	157	179	91	126	628
45 TO 49 YEARS	599	284	315	160	178	124	143	557
50 TO 54 YEARS	498	248	250	143	149	105	101	521
55 TO 59 YEARS	426	187	239	118	137	69	102	455
60 TO 64 YEARS	392	177	215	129	142	48	73	393
65 TO 69 YEARS	395	166	229	98	138	68	91	404
70 TO 74 YEARS	301	128	173	78	112	50	61	275
75 TO 79 YEARS	194	81	113	46	62	35	51	237
80 TO 84 YEARS	90	35	55	20	41	15	14	
85 AND OVER	59	16	43	10	22	6	21	48
UNDER 18 YEARS	4 396	2 227	2 169	996	947	1 229	1 222	5 068
65 AND OVER	1 039	426	613	282	373	174	238	964
MEDIAN AGE	24.1	21.8	26.5	28.7	33.0	17.3	19.9	23.7

[fols. 42-43] Reporter's and Clerk's Certificates to foregoing transcript omitted in printing.

[fol. 44] IN THE SUPREME COURT OF GEORGIA

Case No. 23397

PHIL WHITUS, Plaintiff In Error,

vs.

THE STATE OF GEORGIA, Defendant In Error

From the Superior Court of Mitchell County

Case No. 1229

* * * * * * *

[fol. 45] ENUMERATION OF ERRORS

1

The Court erred in failing to direct a verdict of acquittal for the defendant because of failure of the State to prove, beyond a reasonable doubt, the guilt of the defendant in the crime alleged to have been committed.

2

The Court erred in failing to make its own inquiry into the competency of the testimony of Leon Davis after his admission under cross examination that he was both drunk and insane at the time the crime was committed.

3

The Court erred in failing to charge the jury that drunkeness which dethrones reason and memory, shall incapacitate during its continuance.

4

The Court erred in allowing the witness, Leon Davis to testify, since the said Leon Davis was the perpetrator, and the statement solicited from him by the Solicitor was prior

to his conviction, which made said statement a confession and it did not appear from the record that the Solicitor advised the witness that he had a right to remain silent and it also appeared affirmatively from the record that the Honorable Clarence Mayfield, attorney for the witness, [fol. 46] was not present when the confession was exacted from the witness.

5

The Court erred in dismissing the Challenge to the Array of Petit Jurors since it affirmatively appeared that 49% of the population of Mitchell County were Negroes and only 7% of the petit jury were of the Negro race.

Respectfully submitted, P. Walter Jones.

P. Walter Jones, 505 Park Avenue, Albany, Georgia.

[fol. 47] Certificates of Service omitted in printing.

[fol. 48] IN THE SUPREME COURT OF GEORGIA

Case No. 23397

PHIL WHITUS,

v.

THE STATE

JUDGMENT—April 12, 1966

This case came before this court upon an appeal from the Superior Court of Mitchell County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of costs, $30.00.

[fol. 49] IN THE SUPREME COURT OF GEORGIA

Case No. 23397

Appeal from Mitchell Superior Court, Case No. 1229

PHIL WHITUS, Plaintiff in Error,

vs.

THE STATE OF GEORGIA, Defendant in Error

MOTION FOR REHEARING

Comes now PHIL WHITUS, plaintiff in error in the above stated case, herein referred to as movant, and within the time allowed by law moves for a rehearing and reversal of the decision rendered by this Court on April 12, 1966. The decision of the Court herein was contrary to the contentions of movant, and he respectfully shows to the Court that in rendering said decision the Court overlooked certain material facts in the record and certain decisions, statutes, and a provision of the Constitution of Georgia, which are controlling as authority and which require a different judgment from that rendered; and further that the Court erroneously construed or misapplied certain provisions of law and certain controlling authorities hereinafter set forth.

No charge denied, All the Justices concur.

Preliminary Statement

Before pointing out to this Honorable Court the various grounds upon which they should grant a rehearing, we do not think it would be unwise to show to this Honorable Body that the sum and substance of the whole opinion of this Court and the verdict of the jury below means that [fol. 50] the life of a man will be taken on the sole evidence of one witness, an accomplice, who was drunk and insane on the night his testimony was given. We realize the onerous burden of this Court in attempting to make each and every one of its decisions in strict compliance with the law of the land, we never the less think, without hesitancy, that some times strict rules of law must be ignored

for the sake of justice and mercy and decisions rendered in accordance therewith.

After thoroughly reading the affirming decision of this Court, we note that the entire opinion is based upon the testimony of a man who admits under cross examination that he was drunk on the night of the occurrence, and that while drunk he was insane and remembered nothing. Certainly this Court should not condemn a man to death on this evidence alone regardless of the attempts of this Court to adhere strictly to the principles of law.

Grounds for Motion for Rehearing

1. The Court has overlooked the following material facts in the record, to wit:

(a) It is contrary to the Constitution of the State of Georgia and to the Constitution of the United States of America to convict a man with no evidence whatsoever, and the only evidence upon which the Court could base its decision was the testimony of Leon Davis who, by his own admission, was insane and drunk at the time of the killing.

2. The Court has overlooked the following statute, which is controlling as authority and which would require a [fol. 51] different judgment from that rendered, in that:

(a) Drunkenness, which dethrones reason and memory, shall incapacitate during its continuance. *Code Section 38-1610.*

3. In its headnote enumerated as 1(b), the Court cites as ruling authority the decision of Alfred versus State, 6 Ga. 483 (2) in which it states that a verdict supported by any competent evidence will not be disturbed by the courts. In adhering to this principle of law, the Court must admit that the statement of Leon Davis was competent evidence and was sufficient to sustain a verdict of guilty and, therefore, to allow sending a man to the electric chair.

4. The Court bases its entire opinion on the evidence of Leon Davis and even cites in the headnote of its opinion the testimony of Leon Davis' admission that he was insane at the time of the killing.

5. The Court in some cases, unless there is a challenge to the competency of the witness, may allow the evidence

to go to the jury for their consideration. However, *Code Section 38-1610* states specifically "the Court shall by examination decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, or insanity, or drunkenness, or infancy,". This does not leave the lower court with the discretion of whether or not to make an inquiry nor does it place the burden upon the shoulders of the defending attorneys to demand the inquiry but it makes such inquiry a must and before such inquiry is made the evidence adduced or procured from said witness should be [fol. 52] excluded in its entirety from the jury. The laws of the State of Georgia make it mandatory for the judge to follow that reasoning, and if any doubt rests in the mind of the Court, he should clarify that doubt in his charge to the jury.

6. There is no doubt that in some cases in the absence of a written request the trial judge does ordinarily charge the jury concerning the competency of a witness, however, where the witness himself asserts he was both drunk and insane this fact would not be true.

7. In the fourth enumeration of error it was impossible for movant's counsel to make the objection that the perpetrator made a confession to the Solicitor prior to the trial and before his conviction, and that such confession was made without the presence of perpetrator's counsel and without the advice of the Solicitor that he had the right to remain silent. These facts were not known since the Solicitor himself made the statement in open court after the testimony of Leon Davis.

8. In its decision on the proportionate number of whites and negroes on the jury box, we will follow the reasoning that purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. However, in *Adkins versus Texas, 325 U.S. 398,* the Court overlooked the fact that this was the first time in more than 25 years in the County of Mitchell where any negro was called for service on any petit jury, and no negro to date has served on any petit jury. We believe this is in itself, alone, sufficient to show discrimination in the selection of the jurors.

[fol. 53] We would like to further comment that the way

jurors are selected in the State of Georgia is in itself discriminatory since the statutes of the State of Georgia require the jury commissioners to select prospective jurors from the tax payers digest when at the time this law was enacted this Court can take official cognizance of the fact that white tax payers outnumbered negro tax payers by at least 10 to 1.

9. We would like to vehemently oppose the conclusion reached in Judge Duckworth's opinion in paragraph 3 wherein he stated that the movant in this case had more than eight months to see, hear and have the opportunity of examining all witnesses against him in the previous trial. Leon Davis was only approached as a witness the night before his trial and the defendant's arraignment, if properly done, would have certainly given to the movant the right to further investigate and test the accuracy of Leon Davis' testimony which was damaging.

Conclusion

We have attempted to point out the matters overlooked by the Court and have undertaken to refrain for rearguing the case, and we shall not here repeat our previous arguments, but we do invite a rereading of the supplemental brief heretofore filed on behalf of movant.

Upon each and every ground of this motion, we submit that a rehearing should be granted and the decision reversed.

Respectfully submitted, P. Walter Jones and Morris Brown, By P. Walter Jones, Attorneys for Movant.

P. O. Address: P. O. Box 1115, Albany, Georgia.

[fol. 54] GEORGIA, DOUGHERTY COUNTY.

I, P. WALTER JONES, counsel of record for PHIL WHITUS, movant, certify that upon careful examination of the opinion of the Court in the above stated case, I believe that the facts, statutes, constitutional provision, and decisions pointed out in the foregoing motion for rehearing have been overlooked, or that such provisions of law or controlling authority have been erroneously construed or misapplied.

This 21st day of April, 1966.

P. Walter Jones.

Certificate of service omitted in printing.

[fol. 55] IN THE SUPREME COURT OF GEORGIA

No. 23397

PHIL WHITUS

v.

THE STATE

ORDER DENYING REHEARING MAY 5, 1966

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it bere hereby denied.

[fol. 56] Clerk's Certificate to foregoing transscript omitted in printing.

[fols. 57-58] IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

Atlanta.

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

LEON DAVIS

v.

THE STATE #41968

MINUTE ENTRY OF ORDER TRANSFERRING CASE—March 10, 1966

This case came before this court on appeal from the Superior court of Mitchell county, and upon a record formally certified and transmitted by the clerk of that court; and this court being of the opinion that the case is one of which the Supreme Court and not this court has jurisdiction, the clerk of this court is ordered to dismiss the case from the files and to transmit the record to the clerk of the Supreme Court together with a copy of this order.

Court of Appeals of the State of Georgia:

Clerk's Office, Atlanta, Mar. 10, 1966

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

[Copy illegible] Deputy Clerk.

[fol. 59] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Case No. 1229

THE STATE, vs. LEON DAVIS

NOTICE OF APPEAL—Filed February 25, 1966

Notice is hereby given that LEON DAVIS, defendant above named, hereby appeals to the Court of Appeals from the judgment of conviction and sentence entered herein on the 18th day of October, 1965.

The offense for which defendant was convicted is Murder, and the sentence imposed is as follows: Death in the Electric Chair.

The Clerk will please forward the entire record in said case.

Dated: February 24, 1966.

B. Clarence Mayfield, Attorney for Appellant.

910 West Broad Street, Savannah, Georgia.

[File endorsement omitted.]

Certificate of Service omitted in printing.

[fol. 60] [File endorsement omitted]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

Number —

STATE OF GEORGIA,

vs.

LEON DAVIS

CHALLENGE TO THE ARRAY OF PETIT JURORS—Filed October 16, 1965

Your petitioner, LEON DAVIS, files this his challenge to the array of Petit Jurors selected and now serving on the Petit Jury for the October Term of Superior Court of Mitchell County, Georgia, and shows as follows:

1

The Grand Jury for the July Term of Mitchell County Superior Court has indicted your petitioner for the crime of murder, and it is the intention of the Honorable Fred Hand, Jr., Solicitor General of Mitchell County Superior Court, to try your petitioner before the panel of Petit Jurors summoned for the October Term of the Mitchell County Superior Court.

2

Your petitioner shows that he is a member of the Negro race and has been accused by the State of Georgia of murdering a White farmer in Mitchell County, Georgia.

3

Your petitioner shows that the panel of Jurors which will be cast upon your petitioner are illegally and unconstitutionally composed, and they have been drawn and summoned in derogation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and is further in violation

of Article One, Paragraphs One and Twenty-five of the Constitution of the State of Georgia of 1945.

4

Your petitioner further shows that the said panel of Jurors is illegal and unconstitutional for the following reasons, to wit:

[fol. 61] (a) Up until September of 1959 the Jury Commissioners of Mitchell County, Georgia, had not placed a name of any Negro in the jury box and on September of 1959, without revising the jury list, the Jury Commissioners deliberately placed the names of Twenty-six Negroes in the jury box, said names being selected with the sole purpose of deliberately placing Negroes' names in the box to meet the constitutional requirements, and said names were not placed by the legal drawing of jurors in a revision of the jury lists as required by law.

(b) On the date of the filing of this challenge no Negro has ever served on a Petit Jury in Mitchell County, Georgia. The population of Mitchell County is approximately 19,652 of which 9,000 are Negroes.

(c) The said panel of jurors which is now cast upon your petitioner contains at least 7 Negroes, but your petitioner alleges that the revision of the jury list was done solely and exclusively for the purpose of trying your petitioner and not for the purpose of an honest attempt on the part of the Jury Commissioners to have a constitutionally composed jury as required by law.

(d) Your petitioner further alleges that Negroes have been systematically excluded from jury lists in Mitchell County, Georgia, and that the token or other number of Negroes included on the panel of jurors cast upon your petitioner was not selected in accordance with the laws of the State of Georgia but was selected so as to deliberately include a token or other number of Negroes solely for the trial of your petitioner.

(e) Your petitioner contends and alleges that under the law in force in the State of Georgia at the time of the filing of this petitioner the Jury Commissioners are required to select the names of prospective jurors only from the Tax Receiver's Digest, and the Tax Receiver is required

by Georgia law to maintain the Tax Digest on a racially segregated basis, and therefore, the mechanics for the selection of jurors required by the laws of the State of Georgia make discrimination probable, and as such mechanics for the probability of discrimination do exist by law, it follows that any jury selected under the mandatory requirements of such laws would be unconstitutionally composed.

[fol. 62] (f) Your petitioner further alleges that under the law in force in the State of Georgia at the time of the filing of this petition the Jury Commissioners are required to select upright and intelligent men to serve as jurors and that this requirement establishes on its face and in its application a non-ascertainable standard for jury selection and is void for vagueness.

(g) Your petitioner further alleges that the statutory process for the selection of the names of Petit Jurors and the manner in which said Petit Jurors in Mitchell County, Georgia, were selected has resulted in the systematic exclusion and inclusion of Negroes on the juries in Mitchell County, Georgia.

All of which are in violation of the Due Process of Law and Equal Protection of Law clauses of the Fourteenth Amendment of the Constitution of the United States and the guarantees of Article III, Section 2, and the Fifth, Sixth and Seventh Amendments of said Constitution.

Wherefore, the said Leon Davis prays that his challenge to the array be inquired into and that said array be quashed, and that the said Leon Davis have such and other relief as will meet the ends of equity and justice.

This 16th day of October, 1965.

B. Clarence Mayfield, Attorney for Petitioner.

[fol. 63] *Duly sworn to by Leon Davis; jurat omitted in printing.*

[fol. 64] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Number —

STATE OF GEORGIA

vs.

LEON DAVIS

ORDER TO SHOW CAUSE—October 16, 1965

The above and foregoing petition having been read and considered, it is hereby

ORDERED AND ADJUDGED: that a copy of the within challenge be served as soon as possible upon Mr. Fred Hand, Jr., Solicitor General, and that the same be filed in the office of the Clerk of Superior Court of Mitchell County, Georgia.

IT IS FURTHER ORDERED: that the said Fred Hand, Jr., show cause before me on the day of October, 1965, at— o'clock —.M., at the Court House in Camilla, Georgia, as to why the prayer contained in said petition should not be allowed.

This 16th day of October, 1965.

Carl E. Crow, Judge, Superior Court Mitchell County, Georgia.

[fol. 65] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Number —

STATE OF GEORGIA,

vs.

LEON DAVIS

CERTIFICATE OF SERVICE

The undersigned, Fred B. Hand, Jr., Solicitor of Mitchell County Superior Court, does hereby acknowledge service of the within and foregoing petition. All further service and process expressly waived.

This 16th day of October, 1965.

Fred B. Hand, Jr., Solicitor of the South Georgia Judicial Circuit.

[fol. 66] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

INDICTMENT—Filed April 12, 1965

THE GRAND JURORS, selected, chosen and sworn for the County of Mitchell to-wit:

1 C. B. Collins Foreman.

2 D. B. Harrell
3 James Lee Adams
4 John S. Gaye
5 ~~R. Pratt~~
6 R. T. Hochliffe
7 ~~F. T. Hutto~~
8 Drewry Robinson Sr.
9 J. C. Bellamy Jr.
10 Ray Nazworth
11 ~~Winston Pratt~~
12 J. C. McCullough
13 H. C. King
14 John C. Kemper
15 Lee Ann Collins
16 Drury O. Hayes
17 Clara A. Scruggs
18 Walter L. Rickson
19 Hayward Swipes
20 Thea Thompson
21 L. T. Hatcher
22 Louis M. Bailey
23

In the name and behalf of the citizens of Georgia, charge and accuse Leon (Lynn) Davis and Phil Whitus with the offense of Murder for that the said accused, in the County aforesaid, on the 15th day of November in the year of our Lord, Nineteen Hundred and Fifty Nine with force and arms, and unlawfully, did then and there feloniously and with malice aforethought kill and murder, one James Eldridge "Peter" Glenn, by shooting him to death with a pistol; all

contrary to the laws of said State, the good order, peace and dignity thereof.

FRED HAND, JR., Solicitor General

[fol. 67]

WITNESSES FOR THE STATE

Mrs. Peter Glenn (Douglas Lawrence)
John M. Maples
Lynnwood Williford
Lt. Cecil Franklin
Dr. Herman D. Jones

The Defendant Leon Davis

waive 5 formal arraignment; copy Bill of Indictment, list of witnesses sworn Before the Grand Jury, and agree 5 to strike from a panel of 48 Jurors and plead — not guilty.

This 18 day of October 1965

B. Clarence Mayfield
Defendant's Attorney.

Fred Hand Jr.
Solicitor General.

No. 1229

SUPERIOR COURT

Mitchell County

April Term, 1965

THE STATE

vs.

Leon (Lynn) Davis
Phil Whitus

Murder

True BILL

Brantley Coleman
Foreman.

FRED HAND, JR., Solicitor General

John M. Maples
Prosecutor.

SPECIAL PRESENTMENT

Received in Open Court from the sworn Grand Jury Bailiff, and filed in office this day of

FILED IN OFFICE

19 APR 12 1965

Minnie B. Hoggard Clerk.
CLERK SUPERIOR COURT

The Defendant .....

.....

on being formally arraigned, pleads

.....guilty.....

This .....day of .....

19.....

.....

Solicitor General.

.....

Defendant's Attorney.

We the Jury find the Defendant Leon (Lynn) Davis guilty.

.....

.....

.....

This 18th day of October

19 65

Trudell Adams

Foreman.

We the Jury find the Defendant Phil Mitchell guilty

This 19th day of October 1965

AB Mitchell

Foreman

[fol. 68] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Number 1229

STATE OF GEORGIA

vs.

LEON (Lynn) DAVIS

SENTENCE—Filed October 18, 1965

The jury having returned a verdict of guilty, without a recommendation of mercy, it is considered, ordered and adjudged by the court that the defendant, LEON (Lynn) DAVIS, be taken from the bar of this court to the common jail of Mitchell County, Georgia, to be held there until the sheriff of said County and his lawful deputy and a sufficient guard shall in the manner and within the time prescribed by law, take the defendant LEON (Lynn) DAVIS, to the penitentiary of this State, where, it is ordered, that within the walls of said penitentiary, that the defendant on the 10th day of December, 1965 be put to death by electrocution as provided by law.

There shall be present at such execution the Warden of the penitentiary, who shall serve as executioner, and at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and if the condemned person so desires, his counsel, relatives and such clergymen and friends as he may request.

LEON (Lynn) DAVIS, may God have mercy on your soul.

In open court, this October 18, 1965.

Carl E. Crow, Judge Superior Court, South Georgia Judicial Circuit.

[File endorsement omitted.]

[fol. 69] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

STATE OF GEORGIA

vs.

LEON DAVIS

MOTION FOR NEW TRIAL—Filed October 28, 1965

The Defendant herein being dissatisfied with the judgment and sentence in said case, come within the time allowed by law and moves the Court for a new trial on the following grounds, to wit:

1. Because the verdict is contrary to the evidence and without evidence to support it.
2. Because the verdict is decidedly and strongly against the weight of evidence.
3. Because the verdict is contrary to the law and principles of justice and equity.

WHEREFORE, Defendant prays that these his grounds for a new trial be inquired into by the Court and that he be granted a new trial.

B. Clarence Mayfield, Attorney For Movant.

910 West Broad Street, Savannah, Georgia 31401

[File endorsement omitted.]

[fol. 70] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

LEON DAVIS

vs.

STATE OF GEORGIA

ORDER—RULE NISI—October 28, 1965

The foregoing Motion read and considered. Let the same be filed and served upon the Solicitor General of The South Georgia Judicial Circuit, and let the Solicitor General of the South Georgia Judicial Circuit show cause before me on the 4 day of Dec., 1965 at 10 o'clock a.m., at my office in the Mitchell County Courthouse, Camilla, Georgia, why the motion should not be granted.

Let this Order act as a supersedeas until further order of Court.

In the meantime and until the final hearing of said motion, whenever the same may be had, movant is allowed to amend and perfect the motion.

If, for any reason, said motion is not heard and determined at the time and place above fixed, it is Ordered that the same be heard and determined at such time as may be agreed upon by counsel, and upon failure to agree, then at such time and place as the presiding Judge may fix, on the application of either party, of which time and place the opposite party shall have at least five days notice; and if for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at any term thereafter.

This 28 day of October, 1965.

Carl E. Crow, Judge, Mitchell County Superior Court, South Georgia Judicial Circuit.

[fol. 71] Acknowledgment of service omitted in printing.

[fol. 72] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

LEON DAVIS, also known as LEN DAVIS

vs.

STATE OF GEORGIA

MOTION FOR CONTINUANCE OF MOTION FOR NEW TRIAL—Filed December 3, 1965

COMES now, LEON DAVIS also known as LEN DAVIS, movant, by and through his attorney of record, in the trial and the original motion for new trial, heretofore filed, with leave of court first had and obtained, and files this his motion for continuance for motion for new trial and for grounds shows:

1. Movant shows that the record of the trial has not been made available to his attorney of record as of November 30, 1965, and that the hearing on the original motion for new trial is schedule for a hearing in the Superior Court of Mitchell County, Georgia, on December 4, 1965 at 10:00 o'clock A.M., and that the said attorney wishes to prepare an amendment to his original motion for new trial, but does not feel that said amended motion can be properly prepared by December 4, 1965.

WHEREFORE, Movant prays, that the date for the hearing of motion for new trial be continued until the 29th day of Jan., 1966, without prejudice.

Clarence Mayfield, Attorney for Movant.

[File endorsement omitted.]

[fol. 73] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

LEON DAVIS, also known as LEN DAVIS

vs.

STATE OF GEORGIA

ORDER ALLOWING CONTINUANCE—December 3, 1965

The hearing of the motion for new trial in the above style case is, upon motion of counsel for LEON DAVIS also known as LEN DAVIS, is continued until the 29th day of Jan., 1966, at 10 o'clock a.m., in the Superior Court of Mitchell County, Georgia, and in the meantime and until said hearing is had, all provisions relating to the original motion for new trial are continued in full force and effect, without prejudice.

This 3rd day of Dec., 1965.

Carl E. Crow, Judge, Superior Court, Mitchell County, Georgia.

[fol. 74] Acknowledgement of service omitted in printing.

[fol. 75] [File endorsement omitted]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

STATE

VS.

LEON DAVIS

AMENDED MOTION FOR A NEW TRIAL—Filed January 29, 1966

AND NOW COMES the movant and by leave of the court first had and obtained files that his amended motion for a new trial and says:

1. That the Court erred in permitting the reading of the testimony of the late John M. Maples, who was deceased at the time the testimony was read. The action of the Court deprived the defendant, LEON DAVIS, of his right to cross-examine the alleged statement made by the late Sheriff John M. Maples and thus resulted in a violation of the defendant's constitutional right of due process as guaranteed and assured to him by the Fourteenth Amendment of the Constitution of the United States. The action of court in refusing to strike out said evidence of the late Sheriff John M. Maples in permitting the Solicitor General to argue to the jury along these lines was highly inflammatory and prejudicial and should have been excluded from the consideration of the jury and violated the defendant's due process as provided by law.

2. That the Court erred in permitting evidence offered by the Solicitor General in relation to the State's Exhibits "S-10 and S-11", because it was more conclusively established that either State's Exhibits "S-10 and S-11" were the weapons used to murder Peter Glenn, therefore should have been excluded. The action of the Court in refusing to exclude from evidence said Exhibits "S-10 and S-11" and permitting the Solicitor General to argue to the jury with refer-
[fol. 76] ence to said Exhibits "S-10 and S-11", was highly prejudicial because it was based on an assumption that was not justified by the evidence and from which the Solicitor General could not draw a logical conclusion and which was

highly inflammatory and prejudicial and should have been excluded from the consideration of the jury and violated the defendant's due process as provided by law.

3. That the Court erred in one and all respects set out in the Amended Motion for New Trial and for the reasons set forth thereon.

WHEREFORE, MOVANT PRAYS, that said Amended Motion for A New Trial be allowed and Ordered filed that a New Trial be ordered in said case one or more of grounds set forth in the original Motion for New Trial and/or in the Amended Motion for New Trial.

B. Clarence Mayfield, Attorney for movant.

The undersigned, Robert Culpepper, as Judge of Southern Georgia Judicial Circuit certifies that he is disqualified to act in this matter.

This January 29, 1966

Robert Culpepper, Judge Superior Courts Southern Georgia Judicial Circuit.

[fol. 77] ORDER—January 29, 1966

The recitals of fact in the foregoing amended motion for a new trial being true, the court approves the same and orders said amended motion for a new trial, together with the exhibits attached thereto, made a part of the record in this case.

In Open Court this 29th Day of Jan., 1966.

George R. Lilly, Superior Court, South for Judicial Circuit Presiding.

[fol. 78] Certificate of service omitted in printing.

[fol. 79] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Case No. 1229

THE STATE

vs.

LEON (Lynn) DAVIS

ORDER OVERRULING MOTION FOR NEW TRIAL—January 29, 1966

The motion for new trial in the above case, as amended, is hereby denied and overruled.

This 29 day of January, 1966.

/s/ George R. Lilly, Judge Superior Courts Southern Judicial Circuit, Acting on Behalf of Judge Robert Culpepper, Who is Disqualified in the Above Styled Case.

[File endorsement omitted.]

[fol. 80] MITCHELL COUNTY, GEORGIA:

I, Martha B. Hoggard, Clerk Superior Court, in and for said County and State, do hereby certify that the Notice of Appeal contained herein is the Original Notice of Appeal, and the following items contained within are true and complete copies of their originals; following is the Reporter's copy of the Challenge To The Array of Petit Jurors, and the Reporter's Transcript of Evidence, each this day separately certified by me and transmitted by me with the said attached papers to the Court of Appeals of Georgia, and that they contain all of the Record on Appeal required by the said Notice of Appeal and Amendments thereto to be transmitted to the Court of Appeals.

WITNESS my hand and the seal of said Office, this 7th day of March, 1966.

Martha B. Hoggard, Clerk Superior Court, Mitchell County, Georgia.

[Seal]

[fols. 81-82] IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

THE STATE

vs.

LEON DAVIS

Transcript of Hearing on Challenge to the Array

Before his honor, CARL E. CROW, October 16, 1965.

Appearances:

Fred Hand, Jr., Solicitor General, South Georgia Judicial Circuit, Pelham, Georgia, for State.

B. Clarence Mayfield, Savannah, Georgia, for defendant.

[File endorsement omitted.]

[fol. 83] STIPULATIONS

It is stipulated that the defendant, Leon Davis, is present in open court and represented by counsel from the inception of these stipulations and agreements, and counsel for defendant acknowledges that the defendant is fully cognizant of what is going on.

It is stipulated that according to the best knowledge of the clerk of the Superior Court of Mitchell County, Georgia, that there were 90 Jurors summoned; that four white Jurors were excused; that there were seven Negroes on the panel and possibly more; that there is no designation of race indicated on the Official List of Jurors; and that the Clerk makes the statement regarding the seven Negroes because she is personally acquainted with those seven individuals and on no other basis.

It is stipulated that the testimony of Robert Culpepper delivered in this court on April 16, 1965, on the challenge to the array of Grand Jurors and Petit Jurors in this case, shall be used in this hearing, insofar as it relates to the Petit Jury; that the Solicitor General and the Attorney for the Defendant shall designate to the Reporter the pertinent parts of such testimony, and in case of disagreement between them the Court will make the final determination.

[fol. 84] W. H. CAMPBELL, SWORN:

Direct examination.

By B. C. Mayfield:

Q. State your name and position, Mr. Campbell.
A. W. H. Campbell, Tax Receiver.

Q. Mr. Campbell, prior to the year 1965, you were in control of the tax digest for Mitchell County, Georgia?
A. Yes, sir.

Q. You had two classes of taxpayers, colored and white?
A. Yes.

Q. Did the white taxpayers make their returns on white sheets?
A. Yes.

Q. And did the colored taxpayers make their returns on yellow sheets?
A. Yes, sir.

Q. And that has been the practice of your office operating under a State law——

Solicitor Hand: Your Honor, I object to this line of questioning. It would appear to me that the sole issue involved here today to be considered by this Court and any future courts is whether or not the Petit Jury which is cast upon the defendant in this case has been constitutionally selected, and whether the tax list from which this Petit Jury by law was drawn is of a constitutional nature. What has gone on in years gone by would apparently be irrelevant.

[fol. 85] B. C. Mayfield: If Your Honor please, I intend to show by Tax Commissioner Grogan that they used the 1964 Tax Digest, and one of the allegations in our petition is that under the existing laws in the State of Georgia, and according to recent decisions of the Supreme Court of the United States that if Mr. Campbell follows the letter of the law he cannot select a constitutional jury, because he has sworn to maintain the Tax Digest on a segregated basis. The tax list that we are concerned with now was taken from his 1964 records and was drawn in February 1965, and therefore, the 1964 records would of a certainty be admissible in this hearing.

Solicitor Hand: Your Honor, as a matter of procedure, would it not be more appropriate if Mr. Mayfield would first lay the foundation for this challenge by putting the Jury Commissioner on the stand to determine what they did in fact do?

The Court: I will let him do it any way he wants to.

Q. Mr. Campbell, prior to 1965 the negro taxpayers were kept on yellow sheets?

A. Yes, sir.

Q. And the white taxpayers were kept on white sheets?

A. Yes.

Q. Were you under instructions from any State official to maintain your records that way?

A. Well, I guess that's the way they always had done it.

[fol. 86] Cross-examination.

By Solicitor Hand:

Q. Mr. Campbell, you don't know what procedure the jury commissioners used in selecting any jurors for Mitchell County, do you?

A. No.

B. C. Mayfield: I would like to call Mr. Grogan to the stand.

Mr. Grogan, Sworn.

Direct examination.

By B. C. Mayfield:

Q. Mr. Grogan, are you a tax commissioner?

A. No.

Q. Are you a jury commissioner?

A. Yes, sir.

Q. How many jury commissioners are there in this county?

A. Six, I think.

Q. You have met with those six jury commissioners?

A. Yes, sir.

Q. Are all of those jury commissioners white people?
A. Yes.
Q. Now, Mr. Grogan, when did y'all revise the jury list?
A. February of this year.
Q. February of this year?
[fol. 87] A. Yes, sir.
Q. What records, if any, did you use in revising that list?
A. Well, we used the tax digest.
Q. You used the tax digest. The one maintained by Mr. Campbell?
A. Yes, sir.
Q. The law enforces upon you, Mr. Grogan, the dury of selecting the most intelligent and upright citizens. How did you accomplish that dury imposed upon you by law?
A. Well, we selected the ones from our communities, each individual community, the ones that we knew personally.
Q. The ones you personally knew? You didn't give any taxpayers any intelligence tests, did you?
A. No.
Q. You didn't call them in to talk to them?
A. No.
Q. Did you attempt to get their record, if they had any criminal record?
A. No, we didn't.
Q. What community do you reside in in the county?
A. Pebble City.
Q. You were familiar with the residents of Pebble City?
A. Yes sir.
Q. And the adjacent farms?
A. Yes.
Q. Now, Mr. Grogan, you of necessity know more white taxpayers than you do colored taxpayers, do you not?
A. Yes, I do in that community.
[fol. 88] Q. And the jurors from the Pebble City Community were more or less left up to your discretion?
A. Yes.
Q. Mr. Grogan, the jurors that were used on your revised tax list, did you use the revised tax digest that was kept by Mr. Campbell for the year 1964?
A. Yes sir.

Q. And were the negro taxpayers kept separate and designated by different colored paper?

A. No.

Q. They were the same?

A. All in one book.

Q. Was there any indication designating the negro taxpayer and designating the white taxpayer?

A. No, I don't think so.

Q. You don't think so, sir?

A. There wasn't.

Cross-examination.

By: Solicitor Hand:

Q. Mr. Grogan, at the time the jury commissioners met in February of this year, was it your intention to revise this list in view of a case that the Judge brought to your attention?

A. He advised us to revise the jury list.

Q. In doing so did you purposely include or exclude anyone on the revised jury list because of their race, creed, or national origin?

A. No.

Q. Did you personally practice any discrimination be-
[fol. 89] cause of anyone's race, creed or national origin?

A. We didn't.

Q. You didn't revise this jury list for the sole and exclusive purpose that the State might try Leon Davis, did you?

A. No, I did not.

Q. Did you, if in fact the tax list of Mitchell County, Georgia, was segregated, allow this to effect your decision in anyway as to whether or not you would take a prospective man as a prospective juror?

A. No.

Q. Did you purposely include or exclude anyone from a segregated tax digest, if in fact there was a segregated tax digest?

A. No.

Q. In relation to the standards which you applied in selecting the most intelligent and upright jurors for prospective jury duty, I believe you testified that you tried to abide by the Georgia law in selecting the most intelligent

and upright citizens in the community, and you did it on the basis of personal knowledge of the individuals. Is that correct?

A. That's correct.

Q. Although you might personally know, for example, Joe Doe from Pebble City, would your recommendations in relation to this juror be final, or would the entire jury commission pass on each individual prospective juror?

A. The entire commission passed on each individual juror.

Q. In other words, you would only make the recom-
[fol. 90] mendation as to whether an individual would be qualified?

A. That's right.

Q. Mr. Grogan, I ask you a further question—in examining the prior tax digest, that is prior to 1964, did you determine whether or not the number of negroes making tax returns was as great or nearly as great as white people making tax returns in Mitchell County?

A. In the book we had it wasn't as big a list.

Q. What percentage—in years gone by what would you say the percentage of negro tax returns was to the overall tax return?

A. It would be about thirty per cent, I guess.

Q. That would be your guess.

B. C. Mayfield: I object to years gone by. I have no objection to 1964, because he testified the jury list was made up from the 1964 tax digest, and I think only that tax digest is admissible here.

The Court: I will let it go in.

B. C. Mayfield: Your Honor, I have two questions to ask and I talked with Mr. Hand the other night and will probably require Mr. Grogan to refer to his volume report, and if Mr. Hand has no objection I would like to ask these questions and have Mr. Grogan report his answers at a later date. I would like to inquire of Mr. Grogan how many jurors are on the jury list and how many of those jurors are colored.

[fol. 91] Solicitor Hand: Your Honor, I submit that the witness can answer to his own personal knowledge.

Redirect examination.

By: B. C. Mayfield:

Q. Of your own personal knowledge, without examining those records, Mr. Grogan, can you tell me approximately how many jurors are on the list?

A. On the list now.

Q. Yes.

A. There's around six hundred.

Q. I'll ask you of your own personal knowledge approximately how many of those jurors are colored?

A. I'm afraid I couldn't.

B. C. Mayfield: Would you allow him to go get this information, rather than continue this hearing?

Solicitor Hand: Your Honor, I think one further question might clarify counsel's request.

Recross-examination.

By: Solicitor Hand:

Q. Mr. Grogan, the list that y'all composed of all jurors in Mitchell County, does it have any designation of race on that list?

A. After we had completed it, it didn't have any.

Q. It had no designation of race?

A. No.

Q. Therefore, you would be unable to determine who was a negro and who was not a negro from that list, unless you just happened to personally know them. Is that true?

[fol. 92] A. That's true.

Solicitor Hand: I would submit, your Honor, that it is impossible for Mr. Grogan to furnish this information.

Redirect examination.

By: B. C. Mayfield:

Q. Mr. Grogan, you said after it was completed. While it was being accomplished or making up the list, did you have a designation showing which ones were negroes?

A. Well, we knew which was a negro and which wasn't when we recommended him.

Q. All of the recommendations of the various jury commissioners were acted upon favorably, were they not?

A. Yes sir.

Q. So at the time you were making up the list you knew how many jurors there were and how many of those jurors were negroes, and do you have that information?

A. We didn't tally them that way.

Q. Would you have any approximate idea when the recommendations were made at that time as to how many were negroes?

A. I'd have to guess at it.

Q. Well, would you give us a reasonable guess?

A. Twenty five or thirty percent, I guess.

Recross-examination.

By: Solicitor Hand:

Q. Mr. Grogan, is this just a wild guess by you?

A. Yes sir.

Q. Could it be as high as eighty per cent or sixty per cent?

[fol. 93] A. Well, it could possibly be different.

Q. You just don't really know, do you?

A. I don't know.

Q. You don't know really what the percentage is, do you?

A. No, I'm not sure.

Redirect examination.

By: B. C. Mayfield:

Q. But to your best knowledge it was twenty five or thirty per cent?

A. Well, just guessing at it, that's right.

Recross-examination.

By: Solicitor Hand:

Q. And you could just as well guess there could be as many as forty or fifty per cent?

A. Well, I could, yes sir.

Redirect examination.

By: B. C. Mayfield:

Q. When I first asked you the question, Mr. Grogan, if you had sincerely thought there were fifty per cent, you would have said so, wouldn't you?

A. Well, if I had thought that, I would, but this is just a guess.

Q. In other words, your reasonable guess and as a member of the jury commission, there was only twenty five or thirty per cent?

A. I guess so.

Plaintiff Rests

[fol. 94] Recross-examination.

By: Solicitor Hand:

Q. Mr. Grogan, did you as jury commissioner participate in selecting twenty six negroes in the jury box?

A. The ones present in the box?

Q. Yes. Did you purposely put twenty six in there?

A. Not purposely, no.

W. A. Cain, Sworn

Direct examination.

By: Solicitor Hand:

Q. State your name, please.

A. W. A. Cain.

Q. Are you a jury commissioner of Mitchell County, Georgia?

A. I am.

Q. Were you present when the jury list was revised in February 1965?

A. I was.

Q. Will you relate to the Court the procedure you gentlemen used in revising this list, please?

A. First I believe we went thru the existing jury list, striking off the deceased and the ones who had moved away. Then we took the 1964 tax digest and went thru it with each individual commissioner making recommendations from his home locality, and each selection being passed on by all commissioners and each commissioner being given a chance to object to each recommendation.

[fol. 95] Q. Then did the jury commission as a whole pass on each individual prospective juror?

A. That's correct.

Q. If in fact there is some designation on the 1964 tax digest for this county of race, did this or did it not effect your selection of any prospective juror?

A. It did not.

Q. Did you or any other member of the jury commission, to your personal observation and knowledge, practice any discriminationin regard to race, color, creed or national origin in selecting any prospective juror for the present jury panel?

A. No sir.

Q. Do you have any idea of your own how many negroes are in the jury box of Mitchell County at this time?

A. I do not.

Q. Do you have any idea what percentage of tax returns are made by negroes on the Mitchell County Digest?

A. I do not.

Q. Do you know how many jurors are in the jury box in Mitchell County?

A. If I remember right somewhere between 500 and 600, in the upper 500's. It's in the vicinity of 600, total, I believe.

Q. In the selection of prospective jurors did the jury commissioners try to use the guideline of the most intelligent and upright citizens they personally knew?

A. In my case we did, and I suppose that the other commissioners did.

[fol. 96] Cross-examination.

By: B. C. Mayfield:

Q. You said between 500 and 600. Was that your total jury list?

A. I think that's right.

Q. That does not represent the number of negroes?

A. That represents the total list.

Q. You were using the Tax Digest, were you not?

A. Yes sir.

Q. The negro taxpayers returned theirs on yellow sheets?

A. We did not use the tax returns. We used the tax digest.

Q. On the Tax digest they are marked "colored" and "white" are they not, or are kept in separate sections?

A. Correct.

Q. The law casts upon you the duty to select the most intelligent and upright citizens. How do you proceed to do that? Did you give tests of their intelligence?

A. No sir, we did not.

Q. Did you check criminal records?

A. No sir.

Q. It was done, more or less, by knowledge of the jury commissioners?

A. Yes sir.

Q. All of the jury commissioners are white, are they not?

A. Yes sir.

Q. And each jury commissioner would take his section of the county and make his recommendations to the jury commission as a whole, and those recommendations were followed?

[fol. 97] A. In most cases. I don't know of a deviation, but it's possible there could have been.

Redirect examination.

By: Solicitor Hand:

Q. The jury list that the commissioners ultimately composed, did it have any designation of race on it?

A. It does not.

Solicitor Hand: The State rests.
B. C. Mayfield: We close.
Solicitor Hand: The State closes.
The Court: The Court overrules the motion and the case will be taken up next week.

[fols. 98-99] Reporter's and Clerk's Certificates to foregoing transcript omitted in printing.

[fols. 100-101] IN THE SUPREME COURT OF GEORGIA

LEON DAVIS, Plaintiff in Error,

vs.

STATE OF GEORGIA, Defendant in Error

ENUMERATION OF ERROR—Case No. 23424

AND NOW COMES the Plaintiff in Error and files this, his Enumeration of Errors which he alleges the court committed and shows:

1. That the Court erred in overruling and denying plaintiff in error's motion and amended motion for a new trial on the grounds and for the reasons stated therein.
2. The Court erred in dismissing the Challenge To The Array of Petit Jurors since it affirmatively appeared that 49% of the population of Mitchell County were Negroes and only 7% of the petit jury were of the Negro Race.
3. That the defendant being a pauper was unable to hire private investigators whereas a person of means charged with the same type of offense would have available these advantages, all of which restrictive acts were contrary to the general provisions of law that all persons are entitled to equal protection of the law.

Respectfully submitted, B. Clarence Mayfield.

910 West Broad Street, Savannah, Georgia.

Certificate of Service omitted in printing.

[fol. 102] IN THE SUPREME COURT OF GEORGIA

Case No. 23424

LEON DAVIS

v.

THE STATE

JUDGMENT—April 19, 1966

This case came before this court upon an appeal from the Superior Court of Mitchell County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of Costs, $30.00.

[fol. 103] IN THE SUPREME COURT OF GEORGIA

Case No. 23424

LEON DAVIS, Plaintiff in Error,

vs.

THE STATE OF GEORGIA, Defendant in Error

Appeal from Mitchell Superior Court, Case No. 1225

MOTION FOR REHEARING

Now comes LEON DAVIS, plaintiff in error in the above stated case, herein referred to as movant, and within the time allowed by law moves for a rehearing and reversal of the decision rendered by this Court on April 19, 1966. The decision of the Court herein was contrary to the contentions of movant, and he respectfully shows to the Court that in rendering said decision the Court overlooked certain material facts in the record and certain decisions, statutes, and a provision of the Constitution of Georgia, which are controlling as authority and which require a different judgment from that rendered; and further that the

Court erroneously construed or misapplied certain provisions of Law and certain controlling authorities hereinafter set forth.

Preliminary Statement

Before pointing out to the honorable Court the ground upon which they should grant a rehearing, we do not think it would be unwise to show to this honorable body that this is the first time in the history of Mitchell County that Negroes have served on petit juries, and it has been distinctly held that the deliberate inclusion of Negroes in a jury box would be as unconstitutional as their exclusion.

[fol. 104] Grounds for Motion for Rehearing

1. In its decision on the proportionate number of whites and Negroes on the jury box, we will follow the reasoning that purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. However, in *Adkins versus Texas, 325 U.S. 398,* the Court overlooked the fact that this was the first time in more than 25 years in the County of Mitchell where any Negro was called for service on any petit jury, and no Negro to date has served on any petit jury. We believe that this is in itself, alone, sufficient to show discrimination in the selection of the jurors.

We would like to further comment that the way jurors are selected in the State of Georgia is in itself discriminatory since the statutes of the State of Georgia require the jury commissioners to select prospective jurors from the tax payers digest when at the time this law was enacted this Court can take official cognizance of the fact that white tax payers outnumbered Negro tax payers by at least 10 to 1.

Conclusion

We have attempted to point out the matters overlooked by the Court, and have undertaken to refrain from rearguing the case, and we shall not here repeat our previous arguments, but we do invite a rereading of the original brief heretofore filed on behalf of movant.

Upon this ground of this motion, we submit that a rehearing should be granted and the decision reversed.

[fol. 105] Respectfully submitted, Clarence Mayfield and Morris Brown, By: Morris Brown, Attorneys for Movant.

P. O. Address: 1122 Healey Building, Atlanta, Georgia 30303, Telephone JAckson 4-4456.

[fol. 106] GEORGIA, FULTON COUNTY:

I, MORRIS BROWN, counsel of record for LEON DAVIS, movant, certify that upon careful examination of the opinion of the Court in the above stated case, I believe that the facts, statutes, constitutional provision, and decisions pointed out in the foregoing motion for rehearing have been overlooked, or that such provisions of law or controlling authority have been erroneously construed or misapplied.

This 29 day of April, 1966.

Morris Brown.

Certificate of service omitted in printing.

[fol. 107] IN THE SUPREME COURT OF GEORGIA

23424

LEON DAVIS,

v.

THE STATE

ORDER DENYING REHEARING—May 5, 1966

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1966

No. 519 Misc.

PHIL WHITUS and LEON DAVIS, Petitioners,

v.

GEORGIA

On petition for writ of Certiorari to the Supreme Court of the State of Georgia.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED, IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 10, 1966

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 650 and set for oral argument with case No. 253. A total of one hour is allotted for oral argument of both cases.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969—336-939/220

Supreme Court of the United States

OCTOBER TERM, 1966

No. 253

PHIL WHITUS AND LEON DAVIS, PETITIONERS

vs.

GEORGIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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[fol. 1]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

April Term, 1965

Number 1229

[File Endorsement Omitted]

STATE OF GEORGIA

vs.

PHIL WHITUS

PETITIONER'S CHALLENGE TO THE ARRAY OF GRAND JURORS—filed April 8, 1965

Your petitioner, PHIL WHITUS, files this his challenge to the array of Grand Jurors selected and now serving on the Grand Jury for the April Term of the Superior Court of Mitchell County, Georgia, and shows as follows:

1.

That pursuant to the order and judgment of the United States Court of Appeals for the Fifth Circuit in Whitus versus Balkcom rendered in June 1964 and made final on January 7, 1965, the Honorable Fred Hand, Jr., Solicitor General of the Mitchell County Superior Court, will present the said Phil Whitus for indictment for an alleged homicide by the Grand Jury in and for Mitchell County, Georgia, to be convened on or after the second Monday in April 1965 for the April Term of said Court.

2.

That the said Grand Jury to which said case will be presented for indictment is illegally and unconstitutionally composed and drawn and is in derogation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and is further in violation of Article One, Paragraphs

One and Twenty-Five of the Constitution of the State of Georgia of 1945, said violations itemized as follows:

(a) That up to and including the January Term of the Mitchell County Superior Court no member of the Negro race has ever served on said Grand Jury; although Mitchell County has a population according to the 1960 [fol. 2] census of 19,652 citizens and of this number approximately 9,000 are Negroes.

(b) If any Negroes are selected for jury service on the April Term of the Mitchell County Grand Jury your petitioner contends that the selection of such Negroes must, of necessity, be and will in fact be based solely upon their race and that such deliberate inclusion of Negroes on the said Grand Jury deprives your petitioner of Due Process of Law and Equal Protection of Law guaranteed him by the Fourteenth Amendment of the Constitution of the United States.

(c) Your petitioner contends and alleges that under the laws in force of the State of Georgia at the time of the filing of this petition the Jury Commissioners are required to select the names of prospective jurors from the Tax Receiver's Tax Digest and the Tax Receiver is required by law to maintain his Tax Digest on a racially segregated basis; and therefore, the mechanics for the selection of jurors required by the laws of the State of Georgia make discrimination probable, and as such mechanics for the probability of discrimination do exist by law, it follows that any jury selected under the mandatory requirements of such laws would be unconstitutionally composed.

3.

Your petitioner is a member of the Negro race and has been accused of murdering Peter Glen, Jr., a member of the White race and in such a case in order for the Grand Jury to fairly and impartially act, it is necessary and compulsory that the Grand Jurors be selected without discrimination as to race.

4.

Of the 9,000 Negro citizens in Mitchell County, Georgia, there are many well-educated and highly intelligent citi-

[fol. 3] zens who are, by law, eligible to serve on grand juries.

5.

Your petitioner further contends that the laws of the State of Georgia require that the names of the Grand Jurors who are to serve at the April Term must be drawn in open court immediately after the close of the January Term of the Mitchell County Superior Court, and your petitioner further shows that this was not done in accordance with the requirements of the law.

6.

Your petitioner further shows that both the statutory processes for the selection of the names of Grand Jurors and the manner in which the particular Grand Jurors in Mitchell County were selected has resulted in the systematic exclusion or inclusion of Negroes on grand juries in Mitchell County.

7.

Your petitioner further avers that proceedings before the said Grand Jury will deprive him of Due Process of Law and Equal Protection of Law guaranteed him by the Fourteenth Amendment of the Constitution of the United States and of rights guaranteed him by Article III, Section 2, and the Fifth, Sixth and Seventh Amendments to the Constitution of the United States.

WHEREFORE, the said Phil Whitus prays that his challenge to the array be inquired into and that the said array be quashed, and that the said Phil Whitus have such and other relief as will meet the ends of equity and justice.

This 7th day of April, 1965.

/s/ P. Walter Jones
Of Counsel for Phil Whitus

[fol. 4] *Duly sworn to by P. Walter Jones jurat omitted in printing (all in italics)*

[Certificate of service Omitted in printing]

[fol. 5]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

Number 1229

STATE OF GEORGIA

vs.

PHIL WHITUS

ORDER TO SHOW CAUSE—April 10, 1965

The foregoing petition read and considered, the same is hereby ordered filed. The petition having shown that service of same has been accomplished by mailing a copy of same to the Honorable Fred Hand, Jr., Solicitor of the South Georgia Circuit, let a copy of this Order be served upon the said Mr. Hand and have him show cause before me on the 16 day of April, 1965, at 9 o'clock A.M., at the Court House in Camilla, Georgia, why the prayers contained in said petition should not be allowed.

This 10 day of April, 1965.

/s/ Carl E. Crow
Judge, Superior Court,
Mitchell County, Georgia.

[fol. 6]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

INDICTMENT—filed April 12, 1965

THE GRAND JURORS, selected, chosen and sworn for the County of Mitchell

to-wit:

1 C. B. Collins Foreman.

2 D. B. Harrell

3 Thomas Lee Adams

4 John S. Gale

5 [redacted]

6 E. J. Hinchliffe

7 [redacted]

8 Drewry Robison Sr.

9 J. C. Ballard Jr.

10 Ray Nazworth

11 [redacted]

12 J. C. McCallister

13 H. C. King

14 John C. Kemper

15 Lee Arn. Collins

16 Drewry O. Hayes

17 Cleo A. Scruggs

18 Walter L. Rickson

19 Hayward Snipes

20 Theo Thompson

21 L. T. Hatcher

22 Louis M. Autry

23

In the name and behalf of the citizens of Georgia, charge and accuse Leon (Lynn) Davis and Phil Whitus with the offense of Murder for that the said accused, in the County aforesaid, on the 15th of November in the year of our Lord, Nineteen Hundred and Fifty Nine with force and arms, and unlawfully, did then and there feloniously and with malice aforethought kill and murder, one James Eldridge "Peter" Glenn, by shooting him to death with a pistol; all

contrary to the laws of said State, the good order, peace and dignity thereof.

[fol. 7]

WITNESSES FOR THE STATE

Douglas Townsend
Mrs. Peter Glenn
John M. Maples
Lynnwood Williford
Lt. Cecil Franklin
Dr. Herman D. Jones

* * * *

No. 1229

SUPERIOR COURT
Mitchell County
April Term, 1965

THE STATE

vs.

LEON (LYNN) DAVIS
PHIL WHITUS

Murder

TRUE BILL

/s/ Brantley Collins
Foreman.

FRED HAND, JR., Solicitor General
JOHN M. MAPLES
Prosecutor.

SPECIAL PRESENTMENT

Received in Open Court from the sworn Grand Jury Baliff, and FILED IN OFFICE APR 12, 1965

/s/ Martha B. Hoggard
Clerk Superior Court

* * * *

[fol. 8]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

Number 1229

[File Endorsement Omitted]

THE STATE

vs.

PHIL WHITUS

Number ———

THE STATE

vs.

LEON (LYNN) DAVIS

TRANSCRIPT OF HEARING—April 16, 1965

Challenge to the Array (Grand and Petit)
Before His Honor
Carl E. Crow,

APPEARANCES:

FRED B. HAND, JR.,
Solicitor General
South Georgia Judicial Circuit,
Pelham, Georgia, and
Robert Culpepper, and
James Brim,
Camilla, Georgia,
For The State.

P. WALTER JONES,
Albany, Georgia, and
Morris Brown,
Atlanta, Georgia,
For Defendant Phil Whitus.

CLARENCE MAYFIELD,
910 West Broad Street,
Savannah, Georgia,
For Defendant Leon Davis.

[fol. 9]

Challenge to the Array of Grand Jurors and Petit Jurors

STIPULATION

The defendants, Phil Whitus and Leon Davis, are present in open court with their counsel, P. Walter Jones, Morris Brown and Charles Morgan for Phil Whitus, and Clarence Mayfield for Leon Davis; and

It is agreed between counsel for the defendants and the State that all testimony and evidence in the Challenge to the Array of Grand Jurors and to the Challenge to the Array of Petit Jurors shall be applicable to both cases.

It is further stipulated that each case, that is The State vs. Phil Whitus and the State vs. Leon Davis, will bear its own number and all records will be maintained separately and will not be joined in any manner, except as to the evidence on this hearing.

§ § § § § § § §

[fol. 11] Frank S. Twitty, Sr., Sworn

Direct Examination

By: P. Walter Jones

Q. State your name, please.

A. Frank S. Twitty, Sr.

Q. How long have you been practicing law in Camilla, Georgia, Mr. Twitty?

A. Since June 5th, 1928.

Q. Have you praced in the Superior Court in Mitchell County, Georgia?

A. I have.

Q. Have you attended almost all of the terms of Superior Court?

A. I would say practically.

Q. In your knowledge has any negro ever served on a petit jury in Mitchell County?

A. Yes, we had one as a member of the Grand Jury this term and two on the petit jury list, when I tried a case.

Q. Prior to the April term of court do you remember a negro ever serving on the jury in Mitchell County, Georgia?

A. I don't recall. There could have been, but I just don't recall.

Q. Do you ever remember seeing one?

A. I wouldn't say that I did or didn't.

Q. Have any ever served on your juries?

A. None have ever served on my juries in this court or in Federal Court. I strike them.

[fol. 12] Q. Have any ever been on the panel of jurors which was cast upon you in the trial of a case?

A. There was this time.

Q. I don't mean this time. Any prior to this?

A. I don't recall.

Q. Would you recall, do you think, if it had been done? Isn't it rather unusual?

A. Well, when you've been practicing law for about 37 years and tried about a thousand cases, you can't remember everything that happened.

Q. Do you ever remember striking a juror because he was a negro?

A. Striking one because he was a negro?

Q. In the Superior Court?

A. I usually strike a joror because I'm trying to get the best ones that I think will be better for my client, whether they're black or white.

Q. Have you ever seen a negro sitting in a jury box in Mitchell County?

A. I saw one this term.

Q. Let's eliminate the April term of court. With the exception of the April term of court, have you ever seen a negro sitting in the jury box in Mitchell County, Georgia?

A. I don't think so. I've been thinking about it since I got your subpoena and it seems to me that a negro by the name of Arch Diamond—a big Republican—and [fol. 13] Timothy Katchum—several years ago—I thought they served. I'm not sure, but I have the definite impression that they did serve at one time, but I wouldn't be sure. I'm not sure, but I just have the idea they did.

Q. They didn't serve on your juries?

A. No. In fact, I don't recall any having served on my juries, because my experience with my negro clients is they would rather have white men serve on the jury.

Q. Mr. Twitty, with the exception of the April term, have you been in attendance in court when your case was not being tried?

A. Have I been in attendance when—

Q. Have you been in the court when other cases were being tried?

A. Very seldom do I just hang around. When I'm in court and they select a jury, I'm usually about my business just like I've asked you to let me go now, because I'm trying to get back to my office. I hardly ever hang around when I'm not trying a case.

Q. But all the times you have been in court, with the two exceptions which you think might have happened, do you remember any other negro ever serving on the jury?

A. I can't recall.

Q. Have you ever heard it discussed whether one has served on the jury or not?

A. As I told you, after I got your subpoena the other day, we were talking about it and I say I don't know, but [fol. 14] I remember those two names came up and the people I heard said they were under the impression that they had served on the jury. You asked me if I had had any conversation and a group was talking and they said they thought that there had been several to serve. They said they knew there were quite a few in the jury box and they thought some had served. I don't know. I don't recall.

Q. Who were you talking to?

A. Just a group of us talking.

Q. Who was in that group?

A. I don't recall who all was in the group.

Direct Examination

By: Clarence Mayfield

Q. You are a practicing attorney in Mitchell County?

A. That's correct.

Q. And you have been practicing since 1928?

A. That's correct.

Q. Of your own knowledge has any negro ever served on the grand or petit jury in Mitchell County prior to 1959?

A. I don't recall any specific one.

Q. Since 1959 has there been any negro serving on the grand or petit jury?

A. There is this time. Dewey Robinson, Sr., is on the grand jury, and I know last week we tried a case and the other side struck one by the name of Lewis. They were both colored people.

[fol. 15] Q. What is the negro population of Mitchell County?

A. I don't know, but I would say my guess would be around 40 or 45 per cent of the population.

Q. Of your own knowledge are there any negro property owners in Mitchell County?

A. Yes, there are property owners.

Q. Of your own knowledge do these particular negroes pay taxes on this particular property?

A. I imagine they do. We require everybody to pay taxes on property.

Q. Then would it be a fair assumption to say that there were negroes qualified to serve on grand juries and petit juries prior to 1959?

A. Let me say that I don't think that the fact that a man owns property qualifies him to be a grand juror or a petit juror—just simply the fact that they own property. I think there are other qualifications, which, as you know, are set out in the Code.

Q. Does Mitchell County maintain a common school for negroes?

A. We have the common school system in Mitchell County and we have the negroes and the whites going to school.

Q. Have you any personal knowledge of any negro graduates from the respective schools here in Mitchell County?

A. We have quite a few negroes who have graduated from the Rockdale Consolidated High School.

Q. And if they met the other qualifications would you consider them, in your own opinion, to be qualified to [fol. 16] serve as petit or grand jurors?

A. I'll answer this way. I think that if I were called upon to pass judgment, I'd want to know something about each individual and not just make a blanket statement about somebody being qualified. I think each individual would have to be considered himself. He might own property but he might have served a prison term, or a man could own property and be living in adultery. I think each individual has to be considered alone.

Q. It's your testimony then that each individual juror, grand or petit, is personally selected according to personal qualifications?

A. I haven't served on the Board of Registrars and I don't know what criteria they have used. I was just speaking of myself. You asked me the question about my opinion.

Q. Of your own knowledge, sir, are there separate tax digests maintained for negro and white taxpayers?

A. I honestly don't know. I haven't examined it this year.

Q. Prior to this year, sir, were there separate tax digests maintained for negro and white?

A. There is a possibility that could be. I wouldn't want to say positively until I went down and actually examined them myself to determine. I just don't recall right now whether they were separate or not.

Q. Can you determine for the record the type of designation that was used to differentiate between the negro taxpayer and the white taxpayer?

[fol. 17] A. I have no knowledge of that.

Q. Do you recall whether or not there was a difference in the paper in the ledger maintained for the negro and the white taxpayer?

A. I can't recall at this time. If I could examine them I could tell you, but right now, not knowing that I'd be asked the question, I have no specific knowledge about that.

Q. And it is your testimony that this is the first time in your recollection of your own knowledge that a negro served in this term of court since you have been practicing since 1928, I believe?

A. I have been practicing since 1928. I don't recall any having served.

Q. And this is the first time in your memory, this year?

A. First I can recall right now.

Redirect Examination

by: P. Walter Jones

Q. You say negroes were called for jury duty in the April term of Superior Court?

A. There were negroes on the petit jury last week and there were some on the grand jury.

Q. How many were on the grand jury?

A. I don't recall. I happen to know one of them who is serving on the grand jury. I wasn't up here when they were drawn, but I happen to know Dewey Robinson, Sr., who is doing some work for me, is serving on the grand jury.

[fol. 18] Q. Did you have any cases in superior court?

A. Yes, Mr. Culpepper and I tried a case and there was a negro on the petit jury this past week, or in fact this week.

Q. Do you know how many were summoned for jury duty?

A. No, I really don't.

Cross Examination

By: Solicitor Hand

Q. Did you ever make it your policy to determine whether or not there were in fact negroes on either the petit jury or grand jury?

A. I paid no particular attention to that. I might say that the list didn't say who were negroes and who were white people even this time.

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[fol. 19] E. T. Hughes, Sworn.

Direct Examination

By: P. Walter Jones.

Q. State your name to the court reporter, Judge Hughes.

A. Edward T. Hughes.

Q. Judge, how long have you been practicing law in Camilla?

A. I believe since 1938, 1938 or 1939.

Q. With the exception of the April term 1965, have you ever heard of a negro serving on the grand jury?

A. I can't say that I have.

Q. Have you ever heard of a negro serving on the petit jury?

A. I can't say that I have.

Q. Have you ever heard of a negro summoned for jury duty in the panel of jurors?

A. Seems to me like there was one. I don't remember the time or any particular incident, but seems to be something in my memory about one being summoned. I don't know any details—I don't recall.

Q. Just according to your memory, one might have been summoned for the petit jury?

A. Some court.

Q. Do you know whether any have served on a petit jury in your memory prior to the April 1965 term?

A. I haven't seen any. They could have, but I haven't seen them.

Q. You have been in attendance in court fairly regularly?

A. Well, fairly regularly.

[fol. 20] Q. The three deans of Camilla lawyers are you and Mr. Twitty and Mr. Culpepper. Is that correct?

A. I guess you are referring to us as the senior members—

Q. I'm putting myself in the same category.

A. and I think that would be true.

Direct Examination

By: Clarence Mayfield

Q. Just a couple of questions, Judge. When did you begin the practice of law in Camilla?

A. Either in '38 or '39, somewhere along in there.

Q. And I think it's your testimony on direct by Mr. Jones that you recall one negro serving?

A. I think my testimony was it seems to me like one was called. I am not positive of any details or anything—it just seems like there was one.

Q. Then you cannot positively testify there has ever been a negro, of your own knowledge, who served on the grand or petit jury?

A. I haven't seen one. He could have served without me having seen them on the grand jury or the petit. Personally I don't recall ever having seen one.

Cross Examination

By: Solicitor Hand

Q. Judge, you don't know of your own personal knowledge whether or not 1 or 100 negroes have been summoned to serve on either the petit or the grand jury, do you?

A. No, that could have been without my knowing it.

[fol. 21] Q. Is it customary in this county for jurors, both petit and grand jurors, to ask to be excused from jury service?

A. Correct.

Q. Do you know from your own personal knowledge whether people have been excused?

A. I quite well know that. A number of them have been excused.

Q. From your own personal knowledge you don't know whether any negroes have been summoned prior to this court or not, do you?

A. Not from my personal knowledge. They could have been summoned and then excused.

Q. You don't have any personal knowledge of whether they were or were not summoned, do you?

A. My personal knowledge—I don't recall.

Redirect Examination

By: Clarence Mayfield

Q. In your opinion are there any intelligent qualified negroes to serve on either the petit or the grand jury here in Mitchell County?

A. That calls for an opinion and I would have no basis for expressing an opinion, because I haven't talked with anyone with reference to determine and I don't know what qualifications the jury commissioners use to determine that, and I just wouldn't want to express an opinion, because I have no basis for expressing an opinion.

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[fol. 22] P. Walter Jones: I would like to call Mr. Robert Culpepper.

Robert Culpepper: I would like to state that myself and my associate, Mr. James C. Brim, Jr., are associated with the prosecution.

P. Walter Jones: I understand. Raise your hand, Mr. Culpepper.

Robert Culpepper, Sworn.

Direct Examination

By: P. Walter Jones

Q. State your name.

A. Robert Culpepper, Jr.

Q. Mr. Culpepper, how long have you been practicing law in Camilla, Georgia.

A. I was admitted to practice law in December 1930. I served several years as a court reporter in the Albany Circuit, Cordele Circuit, and with Judge Deavor. I went to Washington for three years as secretary to Congressman Cox, and I came back here January 1, 1937, and I've been consistently practicing law since that date, in Camilla.

Q. Since you have practiced law in Camilla have you ever heard or seen a negro serve on the grand jury in Mitchell County, Georgia?

A. As these others have testified—I've been in and out of court all my life—I don't have any recollection of any

having served. I didn't know who the negroes were [fol. 23] that served this last time. They called a case in court and a negro appeared on the petit jury, named Scott Lewis, and that I didn't know was a negro or not a negro, and actually the side that I represented—we didn't strike him, but he was stricken.

Q. To your knowledge none has ever served on the grand jury? I'm speaking prior to the April term.

A. I have no knowledge one way or the other that any has ever served.

Q. To your knowledge have any served?

A. Not to my personal definite knowledge.

Q. When you have come to court and seen the grand jury in session, you haven't seen a negro on the grand jury prior to the April term of court?

A. I actually don't recall any.

Q. Have you ever heard of a negro serving on the petit jury in the Superior Court of Mitchell County, Georgia, prior to the April term 1965?

A. Actually, I've never seen one on the petit jury here, and I've tried numerous cases in Federal court and I've never seen a negro on a petit jury in Federal court, Thomasville, Albany, Valdosta, and other places.

Q. And you haven't ever seen one in Mitchell County?

A. I don't have any recollection of having seen one.

Q. You and Mr. Twitty and Mr. Hughes are the oldest practitioners in Camilla, aren't you?

A. I don't know how old they are, but I assume we fall [fol. 24] in that category. We're all getting along.

Q. I come in that group too.

Direct Examination

by: Clarence Mayfield

Q. Mr. Culpepper, in the practice of law here in Camilla do you have occasion to do title examination?

A. Frequently.

Q. Do you have occasion also to search the tax digest?

A. Frequently.

Q. Of your own knowledge, does Mitchell County maintain separate tax digests for the white and negro residents of Mitchell County?

A. I don't think they keep separate books on them. It's all in the same digest, same cover.

Q. Is there any indication or designation on the books to indicate whether or not the taxpayer is colored or white?

A. There possibly is, but it's all under the same cover. I couldn't say, but those books are open down there and you can check.

Q. But you do not know whether or not—

A. I've never been impressed by the fact—it has no significance to me—I'm pretty well familiar with most of the negroes who own property—I know most of them.

Q. And since 1937, at which time you say you commenced the practice of law in Camilla, Georgia, you have [fol. 25] never seen a negro serve on the grand or petit jury?

A. I have no personal knowledge or recollection of that. Whether one has served or not, I don't know.

Q. I would like to ask you, sir, in your opinion, as a practicing attorney and based on your statement that you have a personal knowledge of most of the negroes in Mitchell County, would you say there are any who are qualified to serve on grand or petit jury?

A. That goes back to the question of what negro you are talking about, or what white person you are talking about, for that matter, as to whether they should serve on the jury. I know quite a few people of any race that I don't think I'd care to have on the jury. It would address itself to the qualifications of the individual.

Q. If among your local citizens you had what you consider to be an intelligent property owning negro, would you consider him to be qualified to serve on the grand or petit jury?

A. There again it goes back to the individual, just like the registrars—the jury revisers—they address themselves to the individual who comes up and not as a mass proposition, and the registrars do to. Each person stands on his own basis. There might be a lot of things—a man might have a master's degree from Georgia State up here at Albany that might not be able to pass the seventh grade. Actually, I served on the County Board of Edu-

cation a few years and I discovered that we had a negro [fol. 26] teacher who couldn't read and write.

Q. With that exception noted, did you find any who could read or write?

A. Oh, yes, plenty of them could read or write, but, like I said, I wouldn't say carte blanc—I wouldn't take any class, colored or white, and say all of them are qualified or all of them are disqualified to be on the jury. The registrars consider each problem. The law places an obligation on the clerk and the ordinary to advise them about a person's back record for sanity and crime, and they have a right to look into every phase of the matter. Just to say a whole class of folks are qualified is getting into the realm of conjecture.

Q. But you have never seen anyone serve, of the negro race, on either the petit or grand jury. Correct?

A. My most recent experience is that we had one named Scott Lewis from Sale City who was on the petit jury and sat right back there where George Smith is sitting now, and he was not stricken by my side.

Q. Would you, for the record, indicate which term of court this negro served on the jury?

A. It was this term of court.

Q. April term of court, 1965?

A. Right.

[fol. 27] Cross Examination

By: Solicitor Hand

Q. If somebody told you that negroes had served on the petit or grand juries, could you either affirm it or deny it?

A. I would not.

Q. In other words, you don't make it your policy to study whether or not negroes have served on the petit or grand jury?

A. I start studying the jury when I have a given case and the color has nothing to do with it—it may be who they're kin to, where they work, how long they've been in the county, and what they like and dislike. Sometimes you take people who like to drink and sometimes you take people who don't like to drink—their religion has

something to do with it—every phase of a man's life might bear on the particular type case you have. Color has nothing to do with it.

Q. To your personal knowledge, you don't know whether one or a hundred negroes have been summoned for jury service for either the petit or the grand jury, do you?

A. That's correct, but I'd say not a hundred because we don't usually have a hundred on any panel.

Q. You don't know any number, whether it's twenty or—

A. Correct.

Q. Is it also customary in the courts of this county for jurors to ask to be excused, both grand and petit jurors?

[fol. 28] A. Yes. We have the situation with reference to ladies serving. You rarely ever see a lady here serving because they all ask to be excused. I don't know what the negro situation is about negroes being excused. I believe that probably some negroes on this last panel asked to be excused.

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OFFER IN EVIDENCE AND OBJECTION THERETO

P. Walter Jones: At this time we'd like to introduce into evidence the 1960 Census of Population, Volume I, Characteristics of the Population Part 12, Georgia, United States Department of Commerce, and more specifically table 27 as it applies to Mitchell County, Georgia, wherein it shows a total population in the County of persons over 21 as being 10,206, of which 5,726 are white and 4,480 are colored.

Solicitor Hand: I would object to the introduction of this document for the reason it has not been properly identified, and I move that all testimony which has just been read into the record be stricken on that ground.

P. Walter Jones: It is an official record and recognized by law as such.

Solicitor Hand: I insist upon my objection because it has not been properly identified.

[fol. 29] And I insist that Mr. Jones' testimony relating to that be stricken from the record. . . .

The Court: I sustain the objection.

P. Walter Jones: I would like to make an exception to that ruling.

The Court: All right, call your next witness.

§ § § § § § § §

Harvey C. King, Sworn.

Direct Examination

By: P. Walter Jones

Q. Give your name to the court reporter, please.

A. Harvey C. King.

Q. Mr. King, are you one of the duly appointed jury commissioners of the County of Mitchell?

A. I am?

Q. When were you appointed?

A. I don't know—back in the fall. Last year was the first time I served.

Q. That would be in 1964?

A. Yes.

Q. Since your appointment has the jury commission revised its list?

A. Yes.

Q. When did you revise that jury list?

A. I can't recall just when, but sometime back.

[fol. 30] Q. Will you speak a little louder so I can hear you?

A. I can't remember just when, but sometime—I don't remember whether it was in the fall or this spring.

Q. You don't remember whether it was in '65 or '64?

A. No.

Q. Who all was present when the revision took place?

A. Well, the six that was appointed.

Q. Where were you? What space did you use when you revised the jury list?

A. We went down in the Ordinary's room.

Q. What records did you have with you where you could get the names of prospective jurors?

A. Well, we had the tax digest.

Q. Do you recall how the jurors were selected?

A. Well, I wouldn't say that I do. We chose some names.

Q. How did you select those names? Did you go thru the tax digest and call out names?

A. I believe that was it.

Q. That tax digest had the white taxpayers and the colored taxpayers separate?

Solicitor Hand: I have refrained from making objections up to this point, your Honor, but this is a witness for the defendant, he is on direct examination, and counsel has been consistently leading not only this witness but other witnesses, and I would appreciate it if The [fol. 31] Court would suggest to counsel that he ask the questions as provided by law under the rules of evidence.

The Court: Don't ask leading questions, Mr. Jones.

Q. Do the records or do they not have the white and colored taxpayers separate?

A. I can't say.

Q. Do you remember anything about when you selected the white taxpayers and from what records?

A. They were selected right along together.

Q. Who would call out the names? Would you call out the names or one of the other commissioners?

A. I couldn't say. Someone called them out.

Q. What would happen if you called out the name of one of the men on the tax digest? How would you ascertain or find out whether he was to be on the jury list or not?

A. I don't remember just how it was done.

Q. Did you attempt then to discuss the qualifications of each juror?

A. Well, I guess we did. That's usually the thing to do.

Q. Well, if you think you did, how did you discuss those qualifications?

A. I can't recall that.

Q. Did you just pick those names at random, if you didn't discuss it?

A. I wouldn't think we did. I would think there was something said concerning it, but I don't remember just what the discussion was.

[fol. 32] Q. Do you remember anything that was said concerning any juror?

A. That I can't tell you.

Q. Do you remember how many negroes were put on the jury list?

A. No, I can't say.

Q. Do you remember the names of any negroes being discussed?

A. Well, I don't recall.

Q. Do you remember whether any discussion was had as to any of the white jurors selected?

A. Well, I would think it would have been about the same thing.

Q. You don't recall any of the conversations in that room that night at all?

A. I couldn't tell you.

Q. Do you know of your own knowledge of any negro on the jury list who is upright and intelligent?

A. Yes.

Q. Would you name that negro?

A. I think this negro Robinson that served on the jury was intelligent.

Q. Do you know the name of any other upright and intelligent negroes in Mitchell County?

A. Well, there are a few I think—but as far as knowing, I don't.

Q. Why don't you know?

A. Because I haven't had any dealings with them.

[fol. 33] Q. So you haven't had any dealings with them and you don't know whether they are upright and intelligent or not, and as far as you are concerned when the jury list was selected, you don't remember any discussion about any juror?

A. I don't remember too much about it.

Direct Examination

By: Clarence Mayfield

Q. Would you again for the record describe the mechanics that the jury commissioners of Mitchell County used in selecting the jurors, grand and petit, of Mitchell County?

A. Ask that again.

Q. Will you describe in detail the mechanics used by the jury commissioners of Mitchell County in selecting grand and petty jurors?

A. I don't think I could do that.

Q. Once the list has been compiled, what then do you do with it?

A. It's turned in, I guess to the Ordinary.

Q. What, sir?

A. I think it went back to the Ordinary. I don't know.

Q. Well, the list that was certified to the Ordinary, as you have stated, of your own knowledge has there ever been a name of a negro on that particular list?

A. How's that?

[fol. 34] Q. On the list that you have certified to the Ordinary, of your own knowledge, was there ever a negro's name on that particular list?

A. There was negroes names on it.

Q. There were. Now, could you estimate, sir, approximately how many jurors were selected?

A. No, I can't recall that.

Q. You testified you have been a commissioner since 1964?

A. I believe that's right.

Q. For each term of court could you estimate the number of jurors selected from the tax list? For each panel?

A. No.

Q. Would you happen to guess 1, 2 or 3?

A. I wouldn't say.

Cross Examination

By: Solicitor Hand

Q. Mr. King, actually you are just testifying that you don't know the actual proceedure you take on selecting these jurors. Is that correct?

A. That's right. This is my first time.

Q. This is your first time of serving as a jury commissioner?

A. Yes sir.

Q. Did you individually practice any discrimination in the selection of prospective grand jurors or petit jurors?

A. No sir.

[fol. 35] Q. Did you try to select them in a manner so they would be able to meet the constitutional requirements of both the State and Federal Constitutions?

A. I thought that was the thing to do.

Q. Mr. Jones, in one of his questions, referred to your meeting at night. Did y'all meet at night?

A. No sir.

Q. Or in a secreted place?

A. No, in the daytime. We certainly did not.

Redirect Examination

By: P. Walter Jones

Q. Mr. King, you don't remember when you met, do you?

A. You mean the day?

Q. You don't know whether it was 1964 or 1965?

A. I think it was '64.

Q. When I first asked you you said you didn't know what year.

A. Maybe it was.

Q. Mr. Hand asked you the question that you met the constitutional requirements of the United States and of the State of Georgia in selecting the list?

A. Something like that.

Q. And you said you did?

A. To the best of my knowledge.

Q. What are those constitutional requirements?

A. I can't recall all of that.

[fol. 36] Q. Do you know any of the constitutional requirements?

A. Not at the present time.

Q. You say you met in the daytime?

A. Yes.

Q. In the Ordinary's office, and that was either '64 or '65?

A. '64, I believe it was.

Q. Do you remember whether you used the old jury list or not in compiling the new jury list?

A. I would think we did, but I couldn't say.

Q. You couldn't say. Do you know you did?

A. No.

Q. Who was chairman? Who conducted—
A. I don't remember.
Q. You don't remember who the chairman was. Who was present at the meeting?
A. Who was present?
Q. Yes sir, name those who were present when y'all revised the list.

Shirah?

A. Mr. Grogan, Autrey, Childs, Hammond, and—
Q. Did anybody conduct the meeting or did y'all just get in there and have a general bull session?
Solicitor Hand: Your Honor, I have made this objection once before. This is counsel's witness. He is an able lawyer and knows how to ask questions on direct examination.
[fol. 37] Q. Well, Mr. King, tell me just who ran the meeting. Was it run or wasn't it run by one individual?
A. Well, it wasn't run by one individual, I wouldn't think. Each one had something to say along occasionally.
Q. But you still don't remember how you selected the jury, what you used to select the jury?
A. I couldn't say.

Re:Cross Examination

By: Solicitor Hand

Q. Mr. King, let me ask you one further question. Did you personally purposely include or exclude anyone from either the petit jury or grand jury service because of their race, color or religion?
A. I certainly didn't.

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W. H. Grogan, Sworn

Direct Examination

By: P. Walter Jones

Q. You are one of the jury commissioners of Mitchell County, Georgia?
A. Yes sir.

Q. How long have you so served?
A. '64.
Q. Since 1964?
A. Yes.
[fol. 38] Q. Have you recently revised the jury list?
A. Yes, we have.
Q. When did you revise that jury list, Mr. Grogan?
A. In '65.
Q. What month? Do you remember that?
A. February, I think.
Q. February of '65. Did you use the old jury list in revising the jury?
A. We had the old jury list with us, but we didn't specially use it.
Q. Did you have the record from the tax receiver?
A. Yes.
Q. Are you familiar with those records?
A. No, not particularly.
Q. Do you know or not whether those records have the colored taxpayers and white taxpayers separated?
A. Well, they're altogether.
Q. In the digest?
A. Maybe separate digests, but all in one.
Q. When you selected the jurors, tell us the manner in which you would select each juror.
A. We had sections—I mean I was appointed from one section of the county and just the ones in that section are the ones I helped select from. As far as county-wide, I didn't.
Q. How would you get the names of the people in your section?
[fol. 39] A. From the digest, tax digest.
Q. What section do you live in, Mr. Grogan?
A. I live in the eastern section, Pebble City and Sale City.
Q. You live in the Pelham and Sale City section?
A. Pebble City.
Q. Pebble City and Sale City. How many negroes were on the tax digest from that section?
A. I didn't notice how many. There's not as many in that section as there are in other sections of the county.

Q. Were any negroes in that section selected for jury duty?

A. Yes.

Q. Who in that section were selected for jury duty?

A. Well, I don't remember just how many.

Q. Who in that section were selected?

A. Well, I don't know that.

Q. Did they ask you if you knew those negroes personally?

A. Nobody asked me, no.

Q. Did you know the negroes that were selected personally?

A. From my community I did.

Q. Do you remember any of the negroes that were selected from your section?

A. No.

Q. You don't remember any?

A. No, but there were some selected from out there.

Q. What did you do with the old jury list that you had available?

[fol. 40] A. We didn't do anything with it.

Q. Did you use it as reference or did you simply discard it and work completely from the digest?

A. Well, we checked thru it and took off the deceased and the ones that had moved off, but we done that first, so we wouldn't include them in the new list.

Q. When you had purged the old jury list, what did you do with it?

A. We didn't use that. After we took the deceased ones off and those that had moved off—then we went to the tax digest and got the list from the ones in it.

Q. When the names on the tax digest were called out would you know whether they were colored or white?

A. No, we wouldn't.

Q. How would you have known then that coloreds were selected from your area?

A. By personal acquaintance.

Q. You were personally acquainted with those that were selected. Now, do you remember what month in 1964 you were selected as jury commissioner?

A. It was in the fall, October or November.

Q. And the first revision was in February of this year?

A. Yes.

Q. Approximately how many people would you say are residents of your area?

A. I wouldn't know just how many.

[fol. 41] Q. Do you know whether there are more negroes than whites, or less negroes than whites?

A. Less negroes.

Q. Do you know the percentage?

A. No, I don't know that.

Q. Would you say it was 40-60?

A. No, 20-80 probably.

Direct Examination

By: Clarence Mayfield.

Q. How many jury commissioners do you have in Mitchell County, Mr. Grogan?

A. Six, I think.

Q. Do you have any negroes on the jury commission?

A. No.

Q. Of your own knowledge has there ever been any negroe on the jury commission?

A. I don't know.

Q. Do you know how many negroes were selected for the April term of Superior Court of Mitchell County?

A. No, I don't know.

Q. Do you know of your own knowledge whether any were selected?

A. I have been told they were.

Q. Do you know this of your own knowledge, sir?

A. I recognized the name of one in the paper that served on the grand jury.

Q. Would you, sir, hazard a guess as to the total num-

[fol. 42] ber of jurors selected for the April term of court?

A. No, I wouldn't.

Q. You have no idea?

A. No.

Q. When you made your last selections or revised the jury list, did the jury commissioners carry the names of the old list over to the new revised list?

A. Possibly some of them were on it.

Q. Now, of your own knowledge, were there any negroes on the old list prior to the revision?

A. Well, yes, I think there was some.

Q. You thing so?

A. I think so, yes.

Q. How is the tax digest kept? Do you have separate digests for white and colored residents?

A. Well, I don't know how they keep it. Each community has a different digest.

Q. Is it your testimony, sir, that each individual commissioner has the sole discretion in selecting the jurors whom he is going to certify?

A. Yes.

Cross Examination

By: Solicitor Hand

Q. In response to that, your individual jury commissioners just recommend to the commission as a whole whether or not an individual be accepted as a prospective grand juror or petit juror, and the entire commission [fol. 43] passes on each individual prospective grand juror or petit juror. Is that correct?

A. Yes, that's right.

Q. Did you personally purposely include or exclude anyone from prospective grand jury service or petit jury service because of their race, color, creed or national origin?

A. No, I did not.

Redirect Examination

By: Clarence Mayfield

Q. I think it was your testimony on cross examination that the jury commission as a whole passed on the qualifications of the jurors?

A. Well, we all checked it.

Q. Tell me what qualifications you used. What standards did you use to determine the qualifications?

A. Well, the most intelligent, upright citizens of the community over 21 years of age.

Q. Those are the standards that you used?
A. Yes.

Recross examination

By: Solicitor Hand

Q. Those are not the sole standards you used, are they?
A. No.
Q. Do you try to determine whether or not a man has been convicted of a felony or other serious crime or whether he's sane or incompetent?
A. Yes, that's right.
[fol. 44] Q. These factors you have enumerated on the stand are not the sole considerations, are they?
A. No, his character and all are included.

Redirect Examination

By: P. W. Jones

Q. How would you determine his intelligence? What tests did you use?
A. We didn't use tests. But just by knowing him, you have your opinion.
Q. Did you attempt to go into his educational background?
A. No.
Q. Did you attempt to question any of his friends or his neighbors about his intelligence?
A. No.
Q. How did you determine his uprightness?
A. Personally, if I knew him.
Q. Did you personally know the jurors that were selected, all of them?
A. All from our community.
Q. In your community, if you knew all of them, how many were negroes? You would have known whether they were colored or white, wouldn't you?
A. We didn't keep count of them.
Q. But you would know when a name was called out in your community whether that juror was colored or white?
A. If you personally knew him you would, yes.

[fol. 45] Q. Have you got any approximate idea how many colored jurors were selected from your area?

A. Well, I don't.

Q. How many jurors were selected in all?

A. I don't know that number, but between 5 and 600, I guess.

Q. Out of that number how many were negroes?

A. I don't recall. We didn't check it separate.

Q. You have no idea how many negroes are on the jury list at the present time?

A. No, I don't.

Redirect Examination

By: Clarence Mayfield.

Q. I believe it is your testimony that the jury commissioners evaluate individual—

Solicitor Hand: Your Honor, I submit counsel is leading.

Q. What standards again did you say you used to determine the qualifications of a juror?

A. Well, his intelligence, uprightness, character, and the best qualified citizens in the community, highest standards.

Q. Now, would you share the same degree of knowledge of a colored juror as a white juror?

A. Some of them I would.

Q. And on what basis do you predicate this?

A. The same as I told you.

Q. Do you welcome any negro in your home, sir?

[fol. 46] Solicitor Hand: Your Honor, I submit that is irrelevant and an improper question.

Clarence Mayfield: If Your Honor please, I am trying to determine whether or not Mr. Grogan, together with the other commissioners, shares an acquaintance with the negroes such as to determine a man's moral uprightness. . . . I am trying to determine how the commissioner determines whether he exemplifies high moral standards . . .

The Court: I don't think that has anything to do with this case—whether he has been in his home . . . .

Clarence Mayfield: I withdraw the question.

ReCross Examination

By: Solicitor Hand

Q. For the record, let's recap the general method by which you jury commissioners select the various jurors. I believe you testified earlier that each jury commissioner screens people who come from his area of the county—each jury commissioner would know the people who come from his area of the county—and would make a recommendation to the commission as a whole that a man either be accepted or not accepted as a prospective juror. Is that correct?

A. That's right.

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[fol. 47] O. C. Hammond, Sworn.

Direct Examination

By: P. W. Jones

Q. State your name to the court reporter, please.

A. O. C. Hammond.

Q. Mr. Hammond, are you a jury commissioner for Mitchell County, Georgia?

A. Yes sir.

Q. When were you selected or appointed to that position?

A. I believe in '64.

Q. Did you as a jury commissioner participate in the revision of the jury list?

A. I did.

Q. What month was that?

A. It was, I believe, February '65.

Q. February of '65?

A. Yes.

Q. Did you have the tax digest?

A. Yes, we did.

Q. Does that tax digest show which of the taxpayers are colored and which are white?

A. Not necessarily.

Q. What do you mean by not necessarily?

A. Well, that's what I mean.

Q. Could you determine from the digest which were colored taxpayers and which were white?

A. No.

[fol. 48] Q. How were the jurors selected by the jury commission?

A. Well, we went thru and the ones that had moved out of the county and we knew positively they had, and the deceased,—we took them out, and we put in what we thought was the required number to get the digest back up to where—I mean the—

Q. Did you get that information of the deceased and those that had moved out of the county from the tax digest or the old tax list?

A. I don't remember.

Q. How many jurors did you ultimately select for the petit jury?

A. I don't remember.

Q. How many did you select for the grand jury?

A. I have no idea.

Q. How many negroes were on the petit jury?

A. I have no idea.

Q. How many on the grand jury?

A. I have no idea.

Q. Do you remember discussing the qualifications of any of the negro jurors?

A. Well, I'll say this. I'm City Clerk at Pelham, Georgia, and I've worked on about 18 digests since I've been down there and I also have charge of utilities, and I am pretty well familiar with the negroes in my section.

Q. And you would determine then which of the negroes from your section would be on the jury?

[fol. 49] A. Yes sir.

Q. How did you determine which—

A. I just know the ones that are honest and upright—I know they've lived in the county for 6 months, and I'm pretty well familiar with criminal records, and I think I knew.

Q. How many negro college graduates are in your section?

A. I wouldn't know.

Q. Do you know how many negroes have graduated from high school in your section?

A. No, I wouldn't, but there are a good many, I would say.

Q. Do you know how many negroes have moved into your section from other sections who are college graduates?

A. No sir, I do not.

Q. What rule did you use in determining the most intelligent?

A. Well, I think from my association and my job down there that I pretty well know the most intelligent in Pelham. Now, I don't know the ones in Camilla, but in Pelham I do.

Q. Did each jury commissioner finally pass on each one?

A. Yes, we did. We discussed it.

Q. But what happened is they would take your word—

Solicitor Hand: Your Honor, I submit again that counsel is leading.

P. W. Jones: I don't think so, Your Honor. I'm trying to get a simple answer to—

The Court: You were leading. You can re-phrase the question without leading.

[fol. 50] Q. Mr. Hammond, did you or did you not all pass on the qualifications?

A. Isn't that the same question you asked me a few minutes ago?

Q. Yes, but they said I was leading you, and I changed it a little bit.

A. We discussed each individual one we put on, if I remember right and I think that's right.

Q. Did the other commissioners or did they not accept the ones from your area on your sayso?

A. Well, more or less, but I think I do remember one that another commissioner objected to.

Q. Did you or did you not accept the jurors who were in the other commissioners districts on their say?

A. I have confidence in the other five commissioners. I think they are as fine fellows as there are in Mitchell County, and I'd go along with almost anything they say.

Q. Did you or did you not accept their recommendation as to the jurors?

A. Yes, I think so.

Q. Did you or did you not exclude any men which they had selected?

A. No, I didn't.

Q. You accepted everyone?

A. That's right.

[fol. 51] Cross Examination

By: Solicitor Hand

Q. Did you personally purposely include or exclude any person for prospectively grand jury duty or petit jury service because of race, color, creed or national origin?

A. I did not.

Q. Do you personally know how many negroes are in either the petit jury box or the grand jury box?

A. I do not.

Fred B. Hand, Jr., Sworn

Cross Examination

By: P. W. Jones

Q. You are Solicitor of the Mitchell County Circuit, are you not?

A. I'm Solicitor General of the South Georgia Judicial Circuit.

Q. As that Mitchell County is in your jurisdiction?

A. That is correct.

Q. When did you take over the office?

A. In May 1964.

Q. How many terms of the Mitchell County Superior Court have you been in attendance since your selection to that office?

[fol. 52] A. Two, I believe.

Q. One was last July?

A. I believe that is correct.

Q. And the other one was this April?

A. That is correct.

Q. Mr. Hand, were there any negro jurors on your grand jury in the term of court you held last July?

A. I don't remember any.

Q. You dealt with them, did you not?
A. I did.
Q. You were in the room with them?
A. I was.
Q. You worked with them, did you not?
A. I did.
Q. You would certainly remember, wouldn't you?
A. In all probability, I would.
Q. Were there any negro jurors in the petit jury?
A. In the panel?
Q. In the panel?
A. I don't know.
Q. During criminal week did you make an investigation into the jurors to properly strike the list for the State?
A. I did not.
Q. Did you have an assistance in striking the list?
A. At the July term 1964?
Q. Yes.
[fol. 53] A. I don't remember.
Q. Mr. Hand, Mitchell County has a term of court scheduled for January, do they not?
A. I believe that's correct.
Q. Why didn't you hold a term last January?
A. There had been no criminal cases brought to my attention, nor was a grand jury selected, to my knowledge, or called in service to my knowledge.
Q. There were no crimes committed in Mitchell County—
A. I did not say that. I said none were called to my attention.
Q. Do you ever remember another term of Mitchell County Superior Court that was not called at all into session?
A. What is that?
Q. Do you ever recall another term of Mitchell County Superior Court that was cancelled?
A. I don't have any independent recollection of whether courts were called into session or not. I haven't practiced in the county that long.
Q. But the January term was cancelled, was it not?

A. I would not say that it was cancelled.
Q. What happened to it?
A. I don't know, not of my personal knowledge.
Q. They didn't hold the January term, did they?
A. I had no criminal prosecution at the January term of court.
[fol. 54] Q. Did the grand jury meet in January?
A. No, it did not, not to my knowledge. I'll say this in response to your question—we take pleas of guilty by accusation—I draw accusations all during the year when people want to plead guilty, and we will dispose of numerous cases thruout the year in that fashion. If the jail isnt' crowded, we have two terms a year, since I've been solicitor, and we take guilty pleas in the interim, and dispose of quite a few cases. We did that at this term, and it's my policy, as long as the judge agrees, to continue to do that.
Q. But you did not hold the January term of court?
A. I did not.

Direct Examination

By: Robert Culpepper

Q. Isn't it true that for many years we have only two terms of court and that is April and October?
A. From the best information I get that is correct.
Q. For the last four or five years we have had four terms, January, April, July and October, but isn't it true that we have never had a grand jury in January or July?
A. To my knowledge, that is correct.
Q. And for the last two or three weeks we haven't had either civil or grand jury action in January and July?
A. I don't know, but I don't think so.

Re-cross Examination

By: P. W. Jones

Q. Mr. Hand, you met with the grand jury at the April [fol. 55] term of court?
A. I did.
Q. How many negroes were on the grand jury?
A. One.

Q. Do you know how many were on the traverse jury?
A. I do not.

ReCross Examination

By: Clarence Mayfield

Q. Mr. Hand, since you have been solicitor of this judicial circuit have you had occasion or occasions to try cases before a petit jury?

A. I have tried two cases in Baker County, to the best of my memory, and I believe these were misdemeanor cases.

Q. It is your testimony, sir, that you do make presentments to the grand jury?

A. That is correct.

Q. And prior to the April term of this year will you state whether or not there was ever a member of the negro race among the grand jurors? Mitchell County.

A. I have had only one occasion to meet with the grand jury prior to this term and I don't remember one being there, and I don't think there was one there.

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[fol. 56] Martha B. Hoggard, Sworn.

Direct Examination

By: P. W. Jones

Q. State your name, please.
A. Martha B. Hoggard.
Q. What position do you occupy?
A. Clerk of the Superior Court.
Q. Were you present when the grand and the petit jury for the April term of court was drawn?
A. Yes, I was.
Q. Did you make a list of those jurors?
A. Yes, I did.
Q. Did you pay those jurors off by check when the week was over?
A. I did.
Q. Do you know of your own knowledge how many of the grand jurors were negroes?
A. One.

Q. How many of the petit jurors were negroes?
A. One, I believe.
Q. When was the jury list drawn for the April term of court?
A. About two or three weeks before the term.
Q. About two or three weeks before the term of court?
A. Yes.
Q. Where was it drawn?
A. In this courtroom.
[fol. 57] Q. And you are sure it was two or three weeks before the term of court?
A. It was at least that.

Direct Examination

By: Clarence Mayfield

Q. Your name, please?
A. Martha B. Hoggard, H-o-g-g-a-r-d.
Q. Can you estimate, for the record, the number of petit jurors on the April panel?
A. Forty eight, I believe.
Q. Does that include both grand and petit jurors?
A. No. Let me correct that. I was speaking of the first week. There were 90 for the second term.
Q. Ninety for the second term, petit jurors. Can you estimate how many negroes were among this panel?
A. We had three.
Q. On the April panel?
A. On the petit jury.
Q. How many were on the grand jury?
A. Two. One did not appear. I beg your pardon, three and one did not appear, which left two.
Q. What was the number of whites on that same grand jury?
A. There were 30 drawn.

Cross Examination

By: Solicitor Hand

Q. How do you happen to know there were negroes on the grand jury and petit juries?
A. Well, I don't know that they were, but I assumed [fol. 58] they were.

Q. Were you informed that they were?
A. No, I just believe that I knew.

Redirect Examination

By: Clarence Mayfield

Q. How long have you been clerk of the Superior Court of Mitchell County?
A. Since September 14, 1960.
Q. Prior to the April term of court, do you have any personal knowledge of any negroes to serve on either the petit or the grand jury of Mitchell County?
A. I don't remember any.

Recross Examination

By: Solicitor Hand

Q. You are not saying there have not been any?
A. I'm not saying there have not been or have been.

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W. H. Campbell, Sworn

Direct Examination

By: P. W. Jones

Q. What is your position, Mr. Campbell?
A. Tax Receiver.
Q. Do you maintain the tax records for Mitchell County, Georgia?
A. Yes sir.
[fol. 59] Q. Before the taxes are put in this tax digest, the taxpayer is required to come to your office and make a return, is he not?
A. Yes sir.
Q. How do the white taxpayers make their return? What color of paper do they use?
A. White.
Q. How do the colored taxpayers make their returns?
A. White.
Q. They are white?
A. Yes.

Q. Have they always been white?
A. They are this year.
Q. In other words, since the first of January they have been white?
A. Yes.
Q. You are not, therefore, keeping them according to the requirements of the State of Georgia?
A. Yes sir.
Q. Does the State or does it not require the tax returns to be kept on a segregated basis?
A. We got white—all white this year.
Q. Does the State require you to keep the returns on a segregated basis?
A. Yes.
Q. And you didn't do it this year?
A. Yes sir, we did.
[fol. 60] Q. How is your segregated basis?
A. We just mark the white sheets colored.
Q. The white sheets are marked colored?
A. Yes sir.
Q. How is it segregated in the tax digest?
A. Separate digests.
Q. And what is this digest?
A. That's last year's, 1964.
Q. In the 1965 digest do you have one for the colored and one for the whites?
A. Yes.
Q. So all of the colored taxpayers are kept in one digest and the white taxpayers are kept in another tax book?
A. It's in the same book.
Q. In the same book? Well, how do you distinguish between them?
A. We put a "c" on the colored when he comes in and returns his taxes.
Q. In other words, the colored taxpayer is marked with a colored "c"?
A. That's right.
Q. So, if I went thru your tax digest, I could determine from the returns exactly who are colored and who are white, could I not?
A. Yes sir, that's the State law.

[fol. 61] Cross Examination

By: Solicitor Hand

Q. Has the tax digest for the year 1965 been put together yet?

A. It has not.

Q. You don't know how it will be put together?

A. I don't know how we'll fix it.

Redirect Examination

By: P. W. Jones

Q. What tax digest did the tax commissioners use or did you turn over to them in preparing the jury list?

A. They used the whole books, all of them.

Q. All of the books you have? What do you mean by all of the books?

A. Actually I don't have anything to do with that. I guess they go thru the whole last year's books.

Q. They have to get them out of your office, don't they?

A. Yes.

Q. And they take those over to the Ordinary's office, where they held their meeting?

A. I don't know where they met.

Q. But you have to give them to them to take out of your office?

A. No sir, I don't remember giving them one.

Q. They come into your office and take them out?

A. I guess they come in there and look at them.

Q. What books would they have taken or how could they have gotten the list?

[fol. 62] A. Well, I would say in previous years before this year they could look at any of them.

Q. In previous years they would have had to have used them to get that tax list?

A. Yes.

Q. Now, in previous years how would you distinguish colored taxpayers from whites?

Solicitor Hand: Your Honor, I submit that what has happened in the past has nothing to do with this case.

P. W. Jones: Your Honor, he has testified that they took this list from the previous list.

The Court: I overrule the objection.

Q. How would you tell in the previous years? How would you distinguish between the colored taxpayers and the white taxpayers?

A. We had yellow sheets before.

Q. Before this year you had yellow sheets?

A. Yes.

Q. And the colored taxpayers were on yellow sheets?

A. That's right.

Q. And the white taxpayers were on the white sheets?

A. Yes.

Recross Examination

By: Solicitor Hand

Q. You don't know what procedure the jury commission used?

A. No, I don't have anything to do with it.

[fol. 63] Q. You don't know whether they used your books or not, do you?

A. No. I didn't know who they were until this morning.

Q. You don't know where they met, do you?

A. No.

Q. You don't know what method they used in selecting the prospective jurors, do you?

A. No.

Redirect Examination

By: P. W. Jones

Q. But, if they used your books, your books were kept as you have described?

A. You can come down there and look at them and see.

Q. I understand, but I say, if they used your books?

A. Yes.

Q. And they were last year's and the white taxpayers were on white returns and the colored taxpayers were on yellow sheets?

A. That's right.

Redirect Examination

By: Clarence Mayfield

Q. You are the official tax receiver of Mitchell County?
A. That's right.
Q. Does Mitchell County maintain more than one tax office?
A. Only one.
Q. And your books would be the official books, would they not?
A. That's right.
[fol. 64] Q. And those books would designate white as against negro taxpayers?
A. Yes.

§ § § § § § § §

Movants Rest

§ § § § § § § §

W. H. Grogan, Recalled,
for
Cross Examination

By: Solicitor Hand

Q. State for the record your name.
A. Hayes Grogan.
Q. There has been some testimony to the effect that perhaps some of your tax digests have designations of race on the digest. Now, I ask you this: Did you or the jury commission or the other jury commissioners to your knowledge let the fact that the tax digest of Mitchell County had designations as to race or color influence your selection of any prospective grand jurors or petit jurors?
A. We did not.

Direct Examination

By: P. Walter Jones

Q. Mr. Grogan, you knew that the colored were marked colored, didn't you?
[fol. 65] A. No, I didn't know that. I don't know much about the tax digest.

Q. Did you examine the return of each taxpayer?
A. Some of them we did.
Q. Did you see whether some were on white sheets and some were on yellow?
A. Yes.
Q. You didn't know the yellow sheets were colored?
A. I didn't know that, no.
Q. But the sheets were yellow and white?
A. I think so.
Q. Did you know why they were yellow and white?
A. Identification, I guess.
Q. Identification for what purposes?
A. Any way the want to use them. I don't know why they keep the taxes separate.
Q. You said you thought they were that for identification. For what purpose of identification?
A. Well, I don't know. Just for identification is all I know.
Q. Were they to keep them separate from anything?
A. I don't know.
Q. Do you know why they used the two colors?
A. No, I don't.
Q. Nobody inquired as to why they used the two colors?
A. No, I didn't.
Q. No one discussed why they used the two colors? That question was never brought up?
[fol. 66] A. No, not that I remember.
Q. Were the white and yellow colors mixed together or were they separate?
A. They wasn't mixed.
Q. In other words, you had a set of yellow returns and a set of white returns, didn't you?
A. Probably did.
Q. And you didn't inquire as to why there were yellow returns and white returns?
A. We didn't know the difference.
Q. You don't know whether the rest of the commissioners knew or not?
A. No, I didn't ask them.
Q. That's all.

§ § § § § § § §

O. C. Hammond, Recalled.

Cross Examination

by: Solicitor Hand

Q. State your name, please sir.

A. O. C. Hammond.

Q. Mr. Hammond, this morning there has been some testimony delivered on the stand to the effect that the tax digests of Mitchell County show some separation of race, with the colored designated by colored by some means, by a "c" or being on yellow sheets and the whites being on white sheets. Now, I ask you this question: [fol. 67] In the selection of prospective grand jurors and petit jurors, did you personally allow this dual system to effect your selection of any prospective juror?

A. No, I didn't.

Direct Examination

By: P. W. Jones

Q. What is your official position?

A. I'm City Clerk, tax collector, Pelham, Georgia.

Q. In Pelham, Georgia?

A. Yes.

Q. You make your own property tax return on your own personal property, do you not?

A. Yes.

Q. Your return is always made on a white sheet of paper, is it not?

A. Yes.

Q. When you were in the jury box you had a set of white tax returns and a set of yellow tax returns. Why did you think there was a difference in the two colors.

A. Well, it didn't occur to me anyway. I didn't know you made it from the tax returns. I thought you made it from the digest.

Q. One of your commissioners testified that they were made—

Solicitor Hand: Your Honor, I submit that he is leading this witness.

The Court: He will have to testify for himself.

[fol. 68] Q. What records did you use in making the jury list?

A. Well, we used the old list and, of course, we used the digest.

Q. You used the old list and the digest, and that was all that you did use?

Solicitor Hand: Your Honor, I submit counsel is leading the witness again.

Q. Was that all you used or not?

Solicitor Hand: Your Honor, I submit the question is incomplete.

P. W. Jones: Write it out, Mr. Hand, and I'll ask it like you write it.

Q. Did you or did you not use anything else?

A. I thought the law said use the tax digest. Why ask me the question?

Q. I'm just trying to find out what you used. What did you use? You said you used the tax digest and the old list. Did you use anything else?

A. I can't remember using anything else. I try to do what the law says to the best of my knowledge.

§ § § § § § § §

[fol. 69] Harvey C. King, Recalled.

Cross Examination

By: Solicitor Hand

Q. State for the record your name.

A. Harvey C. King.

Q. This morning there was some testimony delivered in court here today that there is perhaps some designation as to race or color on the tax digests of Mitchell County, either by the designation of a "c" or a yellow sheet of paper for the colored taxpayers of the county and a white sheet of paper being used for white taxpayers. Now, if this is in fact true, did the fact that there was a designation of races on the tax digest, did that influence you or effect your selection of any prospective juror, grand juror or petit juror?

A. It did not.

Direct Examination

By: P. Walter Jones

Q. What was used? Was it a "c" or a yellow sheet?
A. I can't remember.
Q. You still don't recall anything about what happened?
A. Not about that, I don't.

§ § § § § § § §

Solicitor Hand: I would like for the record to show that only three of the six jury commissioners summoned by the movants have been put on the stand by the movants.

§ § § § § § § §

ALL CLOSE

[fol. 71] "Indictment filed April 12, 1965" is omitted from the record here. It appears printed at pages 5 and 6 supra.

[fol. 73]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 76]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

APRIL TERM, 1965

Number 1229

[File Endorsement Omitted]

STATE OF GEORGIA

vs.

PHIL WHITUS

ORDER AND JUDGMENT DENYING MOTION FOR A CHALLENGE TO THE ARRAY OF GRAND JURORS— April 19, 1965

WHEREAS, on April 16th the defendant's motion for a challenge to the array of grand jurors having been heard by me in open court, and after consideration of all evidence and testimony adduced at said hearing, it is hereby CONSIDERED, ORDERED and ADJUDGED that the prayers prayed for in said petition are hereby denied.

This 19th day of April, 1965.

/s/ Carl E. Crow
Judge, Superior Court
Mitchell County, Georgia

[fol. 77]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

[File Endorsement Omitted]

BILL OF EXCEPTIONS—filed May 17, 1965

TO THE SUPREME COURT OF THE STATE OF GEORGIA:

Be it remembered that in the case of the State of Georgia against Phil Whitus, based on an indictment returned by the Mitchell County Grand Jury in the January Term of 1960 your plaintiff in error was tried and convicted by a jury in the Mitchell County Superior Court in the January Term, 1960, and was sentenced to be electrocuted. Upon a writ of habeas corpus filed by your plaintiff in error the Fifth Circuit Court of Appeals reversed this conviction and afforded the State eight months from and after the denial of certiorari, said denial being made a judgment of the Federal District Court for the Southern District of Georgia on January 7, 1965, to reindict your plaintiff in error by a grand jury from which Negroes were not systematically excluded and to be retried before a jury from which Negroes had not been systematically excluded, or before some court or tribunal as not to violate the petitioner's constitutional rights.

On the 6th day of April, 1965, your plaintiff in error filed a Challenge to the Array of Grand Jurors for the reason that members of the Negro race had been systematically excluded from grand juries in Mitchell County, Georgia, for more than twenty-five years. Since your petitioner is a member of the Negro race and is alleged to be a principal in the first degree in the murder of a member of the White race, such a challenge was material and pertinent. This challenge to the array was filed before the grand jury returned an indictment, said indictment being returned on the 12th day of April, 1965. [fol. 78] The Honorable Carl E. Crow, Judge of Superior Court of Mitchell County, Georgia, after hearing the evidence and the arguments of both parties, on the 19th

day of April, 1965, passed an order denying said motion, to which judgment denying said motion the plaintiff in this bill of exceptions then and there excepted, and now excepts and assigns the same as error and as contrary to law and contrary to the evidence, and says that the court erred in entering said judgment and in not entering a judgment in favor of the plaintiff in error sustaining his Challenge to the Array of Grand Jurors, upon the following grounds, to wit:

1. Plaintiff in error says that the court erred, as a matter of law, in refusing to allow your plaintiff in error to introduce into evidence the official census of the United States of America showing the population of Mitchell County, and further showing the number of Negroes in said county and the number of Whites in said county. This official census was tendered into evidence by your plaintiff in error and was objected to by the defendant in error, which objection the judge sustained.

2. Plaintiff in error further says that the court erred, as a matter of law, in refusing to grant said motion since the evidence adduced at said trial showed conclusively that members of the Negro race had been systematically excluded from grand juries in Mitchell County, Georgia, same being in violation of the due process of law and equal protection of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States and the rights guaranteed to him by Article 3, Section 2, and the Fifth, Sixth and Seventh Amendments of said Constitution.

[fol. 79] Plaintiff in error comes now on the 17th day of May, 1965, and within thirty days after the refusal to grant said motion and presents to his Honor, the Honorable Carl E. Crow, Judge, who presided in said case, his bill of exceptions, the same being signed and certified according to the statutes in such cases made and provided in order that the case may be carried to the Supreme Court of Georgia, that the errors herein set out and alleged may be considered and corrected by that court.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record, to wit:

1. The petition of your plaintiff in error Challenging the Array of Grand Jurors;

2. The indictment returned by the Mitchell County Grand Jury on the 12th day of April, 1965;

3. The Order and Judgment of the court refusing to grant the prayers in said petition, said Order being signed on the 19th day of April, 1965;

4. A stenographic report of the case, with immaterial questions and answers and parts thereof stricken;

5. Agreement and acknowledgment of service of counsel for defendant in error and entry of filing thereon;

6. The indictment returned by the Mitchell County Grand Jury, hereinbefore referred to, charging your plaintiff in error with a capital offense giving the Supreme Court of the State of Georgia exclusive jurisdiction over said case.

[fol. 80] WHEREFORE, plaintiff in error most respectfully prays that the same may be certified to and transmitted to the Supreme Court of the State of Georgia, in order that the alleged errors may be considered and corrected.

/s/ P. Walter Jones
Of Counsel for Plaintiff in Error

P. O. Box 1115
Albany, Georgia.

[fol. 81]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA.

APRIL TERM, 1965

Number 1229

PHIL WHITUS, PLAINTIFF IN ERROR

v.

THE STATE OF GEORGIA, DEFENDANT IN ERROR

PAUPER'S AFFIDAVIT

Now comes PHIL WHITUS, plaintiff in error in the above stated case, and being dissatisfied with the order of the Judge overruling his Motion for Change of Venue, files this his appeal, and on oath says that he is advised and believes that he has good cause of appeal, and that, owing to his poverty he is unable to pay the costs required by law in cases of appeal.

/s/ Phil Whitus

Sworn to and subscribed before me this 17th day of May, 1965.

/s/ Eileen F. Jones
Notary Public

[fol. 82]

[ACKNOWLEDGMENT OF SERVICE
Omitted in printing]

[fol. 83]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions was tendered to me on the 17 day of May, 1965, and that the same is true, and specifies all the evidence, and specifies all the records material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Mitchell County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and verify the same as such, and cause the same to be transmitted to the Supreme Court of the State of Georgia as early as possible and not exceeding ten days from the filing in said office of the Supreme Court of the State of Georgia that the errors alleged to have been committed may be considered and corrected.

This 17 day of May, 1965.

/s/ Carl E. Crow
Judge, Superior Court,
Mitchell County, Georgia

[fol. 84]

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 87]

IN THE SUPREME COURT OF GEORGIA

Atlanta,

No. 23019

PHIL WHITUS

v.

THE STATE

MINUTE ENTRY OF ORDER TRANSFERRING CASE—
May 26, 1965

From the Superior Court of Mitchell County.

It is ordered that this case be hereby transferred to the Court of Appeals.

* * * *

[fol. 88]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

41420

WHITUS

v.

THE STATE

41421

DAVIS

v.

THE STATE

OPINION—September 8, 1965

NICHOLS, Presiding Judge. These cases were appealed to the Supreme Court and transferred by that

court to this court. Both defendants were indicted for murder but before such indictments were returned each defendant filed a challenge to the array of the Grand Jury based upon the deliberate exclusion and inclusion of negroes on the Grand Jury. After hearing evidence upon the issue thus made the trial court overruled the challenges to the array and it is on such judgment that the plaintiffs in error now assign error, as well as on a judgment during the trial wherein the trial court excluded documentary evidence described by counsel offering the same as "the 1960 Census of Population, Volume 1, characteristics of the Population Part 12, Georgia, United States Department of Commerce, and more specifically table 27 as it applies to Mitchell County, Georgia, wherein it shows a total population in the County of persons over 21 as being 10,206, of which 5,726 are white and 4,480 are colored." Held:

1. Both the trial court and this court will take judicial notice of the United States Census (See Tift v. Bush, 209 Ga. 769; 75 SE2d 805), and while the admission of evidence "to refresh the court's memory" would not be reversible error (See Fields v. Jackson, 102 Ga. App. 117, 128; 115 SE2d 877), the exclusion of evidence of a fact of which the court takes judicial notice in the hearing before the court without the intervention of a jury is not harmful error.

2. The remaining contentions of the plaintiffs in error [fol. 89] are controlled by the decision of the Supreme Court in the case of Brookins v. State, 221 Ga. 181 (143 SE2d), and under such decision show no reversible error.

Judgments affirmed. Eberhardt and Pannell, JJ., concur.

Decided September 8, 1965.

[fol. 90]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA,

No. 41420

PHIL WHITUS

v.

THE STATE

JUDGMENT—September 8, 1965

This case came before this court upon an appeal from the Superior court of Mitchell county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Nichols, P. J., Eberhardt and Pannell, JJ., concur.

BILL OF COST, $30.00

* * * *

[fol. 91]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

No. 41420

Decided—September 8, 1965.

PHIL WHITUS, PLAINTIFF IN ERROR

vs.

THE STATE OF GEORGIA, DEFENDANT IN ERROR

MOTION FOR REHEARING—filed September 17, 1965

TO THE COURT OF APPEALS OF
THE STATE OF GEORGIA:

Comes now PHIL WHITUS, Plaintiff in Error, and within the time allowed by law, files this his motion for rehearing in the above stated case, and for grounds thereof says:

For the sake of brevity, Plaintiff in Error is hereafter referred to as Accused and Defendant in Error is hereafter referred to as the State.

I. THE COURT'S OPINION IN PARAGRAPH ONE OF ITS DECISION IS NOT SUSTAINED BY ANY OF THE CITED DECISIONS AND IS IN CONFLICT WITH THE LAWS OF THIS STATE.

The trial court excluded from its consideration the evidence cited by the Court of Appeals showing that "the 1960 Census of Population, Volume 1, characteristics of the Population Part 12, Georgia, United States Department of Commerce, and more specifically table 27 as it applies to Mitchell County, Georgia, wherein its shows a total population in the County of persons over 21 as being [fol. 92] 10,206, of which 5,726 are white and 4,480 are colored."

We must presume that the Honorable Carl Crow, presiding Judge of the lower court, acted in his usually fair

and honest method in his determination of the facts presented to him at the hearing. He was in error in not allowing the evidence concerning the Census to be introduced, and since he believed it could not be introduced, he must of a necessity have failed to take into consideration the facts shown by the Census and therefore the opinion that he made would of a necessity be erroneous. Many judges may be in error as to their impression of the law but we certainly cannot assume or believe that any jurist in the State of Georgia would be deliberately unfair. With this thought in mind we can certainly assume that the trial court judge believed in all sincerity that the Accused had only proven that only one negro had ever served on a Grand Jury in Mitchell County, Georgia, but had failed to prove anything with regards to the number of negro citizens in the County. If that be true, the Accused would have failed to make out a prima facie case and the judge would have been correct in his denial of the motion. The mere fact that the judge did not believe that the Census was admissible would unalterably lead to the conclusion that he did not consider it as evidence nor did he take judicial notice of its existence.

II. THE SECOND PARAGRAPH OF THE COURT'S OPINION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, THE COURT OF APPEALS OF THE STATE OF GEORGIA AND THE SUPREME COURT OF GEORGIA.

[fol. 93] This Honorable Court has admitted in its opinion that the Court should have taken judicial notice of the 1960 Census as it applied to Mitchell County, Georgia. This Census showed, in ages over 21, that 5,726 were white and 4,480 were colored. The Accused proved without question and without contradiction that only one negro had ever served on a Grand Jury in Mitchell County, Georgia. A long line of decisions of the Supreme Court of the United States have systematically and without exception held that these two facts made out a prima facie case of the systematic exclusion of negroes from a grand jury and there was cast upon the State the burden

of proving that the grand jurors had been constitutionally drawn.

A review of the evidence offered by the State shows, with remarkable clarity, the vagueness and lack of memory of all of their jury commissioners and was quite remarkable in the fact that none of the commissioners could remember how, or in what manner, or from what records, or in whose office, or at what time, the names of the grand jurors were selected.

The State cannot hope to overcome the vagueness of the commissioners by their parrot-like yes's to the one question, "Were negroes systematically excluded from the Grand Jury?" Though their affirmatives ran out like a clarion bell to this question, their memories in other respects were clogged with cobwebs of doubt.

In addition to the mystic maze left by the evidence of the jury commissioners, this Court may also take judicial notice of the decision by the Fifth Circuit Court of Ap- [fol. 94] peals (Whitus v. Balkcom, 333 F2d 496) wherein the State admitted that negroes had been systematically excluded from all juries in Mitchell County, Georgia, through January of 1960. This may be taken into consideration with the uncontradicted fact that there was no revision of the jury list until just prior to the April 1965 Term of the Superior Court.

This Honorable Court cited Brookins v. State, (22979), Ga. (SE2d), which counsel does not have since it has not yet been published, however this Court is in conflict with itself and in 110 Ga. App. 56, on page 66, this very Court held:

> "Whenever Negroes have been systematically excluded from jury service in Georgia it has been in defiance of, rather than in compliance with, Georgia law. Never in its history has Georgia by law systematically excluded Negro citizens as a class from jury service. On the contrary, it has always been the law that they are not so excluded. As the Supreme Court of Georgia stated in Wilson v. State, 69 Ga. 224, 237, supra, "In the law . . . as in the Constitution (provisions respecting selection of jurors), it will be seen that no distinction resting on race or

color is made; and . . . it is made a felony (Code Section 26-4010), punishable by penitentiary imprisonment, for any commissioner to violate the law in this regard." The general law must be followed throughout the State. Tompkins v. State, 138 Ga.
[fol. 95] 465, 468, supra. An accused, irrespective of his race, cannot be indicted before a grand jury or tried before a traverse jury not legally impaneled. Finnegan v. State, 57 Ga. 427, supra; Wilson v. State, 69 Ga. 224, 236, supra; Tompkins v. State, 138 Ga. 465, 469, supra.

When an irregularity in criminal proceedings involving the constitutional rights of a defendant is shown, it is per se injurious to the defendant. Zugar v. State, 194 Ga. 285, 291 (21 SE2d 647); Montos v. State, 212 Ga. 764, 766 (95 SE2d 792); Bobo v. State, 103 Ga. App. 685, 686 (120 SE2d 203); Thiel v. Southern Pacific Co., 328 U.S. 217, 220, Supra; Fay v. New York, 332 U.S. 261, 300, supra (dissenting opinion); United States v. Roemig, 52 FSupp. 857, 862, supra; People v. Medeoff, 344 Mich. 108 (73 NW2d 537); Zimmerman v. State, 191 Md. 240 (59 A2d 675).

The unlawful selection of juries is, of course, more than an irregularity. Rudd v. State, 231 Ind. 105 (107 NE2d 178). "Grand jurors who have not been lawfully impaneled or sworn have no more authority to find indictments than the same number of citizens outside of the courthouse—they are not a grand jury in law." Tompkins v. State, 138 Ga. 465, 467, supra;
[fol. 96] accord Glass v. State, 109 Ga. App. 353, 354, supra; Ludden v. State, 109 Ga. App. 745, supra.

"Whenever the State undertakes to deprive one of its citizens of his life or liberty, it is the duty of the courts to see that it is done in accordance with the laws of the land, and not otherwise." Finnegan v. State, 57 Ga. 427, 430, supra. If there is anything sacrosanct, it is that there cannot be a legal right to break the law under the law. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with im-

punity. All of the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government." United States v. Lee, 106 U.S. 196, 220 (1 SC 240, 27 LE 171). All of us, the public officer and the civil rights demonstrator, must accept the rule of law and abide by it in all areas of our lives, or no one will abide by it and we cannot be protected in our rights in any area. See Hurtado v. California, 110 U.S. 516, 536, supra. The law is the law—is the law—is the law."

CONCLUSION

We respectfully submit that the Court has overlooked [fol. 97] vital parts of the evidence in this case and the authorities applicable thereto, and has misconstrued the Court's rejection of the facts and figures of the 1960 Census.

WHEREFORE, plaintiff prays that this his motion for rehearing be granted, and that the decision of the Court be reversed.

Respectfully submitted,

CHARLES MORGAN, JR.,
and P. WALTER JONES

By /s/ P. Walter Jones
Attorneys for Plaintiff in Error

P. O. Address:

P. O. Box 1115,
Albany, Georgia 31702

GEORGIA, DOUGHERTY COUNTY.

I, P. WALTER JONES, of counsel for the Accused, do certify that upon careful examination of the opinion of this Court and the authorities cited therein, and upon careful examination of the record and the decisions cited herein do verily believe that these have been overlooked

by this Court and that such facts and decisions would require a different judgment from that rendered, and believe that the Court has erroneously construed the statutes and decisions cited in its opinion.

This 16th day of September, 1965.

/s/ P. Walter Jones

[fol. 98]

[Certificate of service Omitted in printing]

[fol. 100]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA,

No. 41420

PHIL WHITUS

v.

THE STATE

ORDER DENYING MOTION FOR REHEARING—
September 22, 1965

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

* * * *

[fol. 101]

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA.

Case Number 41420

[File Endorsement Omitted]

PHIL WHITUS

vs.

STATE OF GEORGIA

NOTICE OF INTENTION TO APPLY TO THE SUPREME COURT OF GEORGIA FOR WRIT OF CERTIORARI— filed October 1, 1965

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA:

You are hereby notified that it is the intention of PHIL WHITUS, Plaintiff in Error, to apply to the Supreme Court of Georgia, for the writ of certiorari to review the judgment of the Court of Appeals rendered and filed in the case above stated on September 8, 1965, in which case a motion for re-hearing was denied on September 22, 1965. A certified copy of the entire record is hereby ordered.

This 30th day of September, 1965.

/s/ P. Walter Jones
Attorney of Record for Plaintiff in Error.

P. O. Box 1115,
Albany, Georgia.

[fol. 102]

[Certificate of Service Omitted in printing]

[fol. 103]

IN THE SUPREME COURT OF GEORGIA
ATLANTA,

No. 23239

PHIL WHITUS

v.

THE STATE

ORDER DENYING APPLICATION FOR WRIT OF CERTIORARI—
November 9, 1965

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur except Mobley, J., not participating for providential cause.

BILL OF COSTS, $15.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA
Nov. 24, 1965

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that American Civil Liberties Union paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Henry H. Cobb, Clerk.

Case No. 41420

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office Nov. 24, 1965

/s/ Morgan Thomas
Clerk Court of Appeal of Georgia.

[fol. 104]

[Clerk's Certificate to foregoing transcript omitted in printing]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

INDICTMENT—filed April 12, 1965

THE GRAND JURORS, selected, chosen and sworn for the County of Mitchell

to-wit:

1 C. B. Collins Foreman.

2	D. B. Harrell	13	H. C. King
3	James Lee Adams	14	John C. Kemper
4	John S. Gee	15	Lee Arn. Collins
5	[illegible]	16	Drewry O. Hayes
6	E. T. Hinchliffe	17	Cleo A. Scruggs
7	[illegible]	18	Walter L. Rideon
8	Drewry Robinson Sr.	19	Hayward Snipes
9	J. C. Bullard Jr.	20	Theo Thompson
10	Ray Nazworth	21	L. T. Hatcher
11	[illegible]	22	Louis M. Hatley
12	J. C. McCollum	23	

In the name and behalf of the citizens of Georgia, charge and accuse Leon (Lynn) Davis and Phil Whitus with the offense of Murder for that the said accused, in the County aforesaid, on the 15th day of November in the year of our Lord, Nineteen Hundred and Fifty Nine with force and arms, and unlawfully, did then and there feloniously and with malice aforethought kill and murder, one James Eldridge "Peter" Glenn, by shooting him to death with a pistol; all

contrary to the laws of said State, the good order, peace and dignity thereof.

[fol. 106]

WITNESSES FOR THE STATE

Douglas Townsend
Mrs. Peter Glenn
John M. Maples
Lynnwood Williford
Lt. Cecil Franklin
Dr. Herman D. Jones

* * * *

No. 1229

SUPERIOR COURT

Mitchell County

April Term, 1965

THE STATE

vs.

LEON (LYNN) DAVIS
PHIL WHITUS

Murder

TRUE BILL

/s/ Brantley Collins
Foreman.

FRED HAND, JR., Solicitor General
JOHN M. MAPLES
Prosecutor.

SPECIAL PRESENTMENT

Received in Open Court from the sworn Grand Jury Baliff, and FILED IN OFFICE APR 12, 1965

/s/ Martha B. Hoggard
Clerk Superior Court

* * * *

[fol. 107] "Petitioner's Challenge to the Array of Grand Jurors, Order to Show Cause, Transcript of Hearing and Order and Judgment denying motion for a challenge to the Array of Grand Jurors" in case of *State* v. *Leon Davis* are omitted in printing as they appear in identical form in case of *State* v. *Phil Whitus*, pages 1-50 supra.

[fol. 108]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

[File Endorsement Omitted]

BILL OF EXCEPTIONS—filed May 18, 1965

TO THE SUPREME COURT OF THE STATE OF GEORGIA:

Be it remembered that in the case of the State of Georgia against Leon Davis, based on an indictment returned by the Mitchell County Grand Jury in the January Term of 1960 your plaintiff in error was tried and convicted by a jury in the Mitchell County Superior Court in the January Term, 1960, and was sentenced to be electrocuted. Upon a writ of habeas corpus filed by your plaintiff in error the Fifth Circuit Court of Appeals reversed this conviction and afforded the State eight months from and after the denial of certiorari, said denial being made a judgment of the Federal District Court for the Southern District of Georgia on January 7, 1965, to reindict your plaintiff in error by a grand jury from which Negroes were not systematically excluded and to be retried before a jury from which Negroes had not been systematically excluded, or before some court or tribunal as not to violate the petitioner's constitutional rights.

On the 10th day of April, 1965, your plaintiff in error filed a Challenge to the Array of Grand Jurors for the reason that members of the Negro race had been systematically excluded from grand juries in Mitchell Coun-

ty, Georgia, for more than twenty-five years. Since your petitioner is a member of the Negro race and is alleged to be guilty of the murder of a member of the white race, such a challenge was material and pertinent. This challenge to the array was filed before the grand jury returned an indictment, said indictment being returned on the 12th day of April, 1965.

[fol. 109] The Honorable Carl E. Crow, Judge of Superior Court of Mitchell County, Georgia, after hearing the evidence and the arguments of both parties, on the 19th day of April, 1965, passed an order denying said motion, to which judgment denying said motion the plaintiff in this bill of exceptions then and there excepted, and now excepts and assigns the same as error and as contrary to law and contrary to the evidence, and says that the court erred in entering said judgment and in not entering a judgment in favor of the plaintiff in error sustaining his Challenge to the Array of Grand Jurors, upon the following grounds, to wit:

1. Plaintiff in error says that the court erred, as a matter of law, in refusing to allow your plaintiff in error to introduce into evidence the official census of the United States of America showing the population of Mitchell County, and further showing the number of Negroes in said county and the number of whites in said county. This official census was tendered into evidence by your plaintiff in error and was objected to by the defendant in error, which objection the judge sustained.

2. Plaintiff in error further says that the court erred, as a matter of law, in refusing to grant said motion since the evidence adduced at said trial showed conclusively that members of the Negro race had been systematically excluded from grand juries in Mitchell County, Georgia, same being in violation of the due process of law and equal protection of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States and the rights guaranteed to him by Article 3, Section 2, and the Fifth, Sixth and Seventh Amendments of said Constitution.

[fol. 110] Plaintiff in error comes now on the 18th day of May, 1965, and within thirty days after the refusal to

grant said motion and presents to his Honor, the Honorable Carl E. Crow, Judge, who presided in said case, this his bill of exceptions, the same being signed and certified according to the statutes in such cases made and provided in order that the case may be carried to the Supreme Court of Georgia, that the errors herein set out and alleged may be considered and corrected by that court.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record, to wit:

1. The petition of your plaintiff in error Challenging the Array of Grand Jurors;
2. The indictment returned by the Mitchell County Grand Jury on the 12th day of April, 1965;
3. The Order and Judgment of the court refusing to grant the prayers in said petition, said Order being signed on the 19th day of April, 1965;
4. A stenographic report of the case, with immaterial questions and answers and parts thereof stricken;
5. Agreement and acknowledgment of service of counsel for defendant in error and entry of filing thereon;
6. The indictment returned by the Mitchell County Grand Jury, hereinbefore referred to, charging your plaintiff in error with a capital offense giving the Supreme Court of the State of Georgia exclusive jurisdiction over said case.

[fol. 111] WHEREFORE, plaintiff in error most respectfully prays that the same may be certified to and transmitted to the Supreme Court of the State of Georgia, in order that the alleged errors may be considered and corrected.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error

Savannah, Ga.

[fol. 112]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

APRIL TERM, 1965

Number 1229

LEON DAVIS, PLAINTIFF IN ERROR

v.

THE STATE OF GEORGIA, DEFENDANT IN ERROR

PAUPER'S AFFIDAVIT

Now comes Leon Davis, plaintiff in error in the above stated case, and being dissatisfied with the order of the Judge overruling his Motion for Change of Venue, files this his appeal, and on oath says that he is advised and believes that he has good cause of appeal, and that, owing to his poverty he is unable to pay the costs required by law in cases of appeal.

/s/ X (his mark)
LEON DAVIS

Sworn and subscribed to before me this 18th day of May, 1965.

/s/ Martha B. Hoggard
Notary Public

[fol. 113]

[ACKNOWLEDGMENT OF SERVICE
Omitted in printing]

[fol. 114]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

GEORGIA, MITCHELL COUNTY

I do certify that the foregoing bill of exceptions was tendered to me on the 18 day of May, 1965, and that the same is true, and specifies all the evidence, and specifies all the records material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Mitchell County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and verify the same as such, and cause the same to be transmitted to the Supreme Court of the State of Georgia as early as possible and not exceeding ten days from the filing in said office of the Supreme Court of the State of Georgia that the errors alleged to have been committed may be considered and corrected.

This 18 day of May, 1965.

/s/ Carl E. Crow
Judge, Superior Court,
Mitchell County, Georgia

[fol. 115] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 116]

IN THE SUPERIOR COURT OF MITCHELL COUNTY, GEORGIA

Case No. 1229

[File Endorsement Omitted]

LEON DAVIS, PLAINTIFF IN ERROR

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR

Challenge to the Array (Grand & Petit)

NOTICE OF PRESENTATION OF BRIEF OF EVIDENCE FOR APPROVAL—filed May 19, 1965

TO THE HONORABLE FRED B. HAND, JR., Attorney of Record for THE STATE OF GEORGIA:

You are hereby notified that I shall present to the Honorable Carl Crow, Judge of the Superior Court of Mitchell County, Georgia, at 2 o'clock P.M., on the 19 day of May, 1965, a Brief of Evidence in the above stated case for approval in his office in the Court House in Mitchell County, Georgia.

This Notice is given you pursuant to the provisions of Section 6-802 of the Code of Georgia. This 19 day of May, 1965.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 117]

[ACKNOWLEDGEMENT OF SERVICE Omitted in printing]

ORDER APPROVING—May 19, 1965

The foregoing 61 pages of typewritten material are hereby approved as containing a correct brief of the evidence in said case, and the same are hereby ordered filed as part of the record in said case.

This 19 day of May, 1965.

/s/ Carl E. Crow
Judge, Superior Court of
Mitchell County, Georgia

[fol. 119]

IN THE SUPREME COURT OF GEORGIA
ATLANTA

LEON DAVIS *v.* THE STATE — 23020

MINUTE ENTRY OF ORDER TRANSFERRING CASE—
May 26, 1965

From the Superior Court of Mitchell County.

It is ordered that this case be hereby transferred to the Court of Appeals.

* * * *

[fol. 120] "Opinion of Presiding Judge Nichols, decided September 8, 1965" is omitted from the record here as it appears on pages 56-57 supra.

[fol. 122]

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA

LEON DAVIS *v.* THE STATE — 41421

JUDGMENT—September 8, 1965

This case came before this court upon an appeal from the Superior court of Mitchell county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Nichols, P. J., Eberhardt and Pannell, JJ., concur.

Bill of Cost, $30.00

* * * *

[fol. 123]

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Case No. 41421

LEON DAVIS, PLAINTIFF IN ERROR

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR

MOTION FOR REHEARING—filed September 17, 1965

The decision in the above case was rendered on September 8, 1965, and within Ten (10) days thereafter Plaintiff in Error moves the Court for a rehearing on the grounds that:

1. That evidence in said case was sufficient to show the systematic exclusion of Negroes from service upon the grand jury which indicted the plaintiff in error, and movant asks the court to reexamine the evidence in said case.

2. There was insufficient emphasis placed on the complete testimony Mr. W. H. Campbell, who testified under cross-examination "All of the colored taxpayers are kept in one digest and the white taxpayers are kept in another tax book."

3. We urge the Court to reconsider its ruling in light Avery V. Georgia, 345 U.S. 559, cited by Brief of Plaintiff in Error, which sets forth the principle that when in considering the facts evidence and all reasonable deductions therefrom that "Opportunity for working of a discriminatory system exist whenever the mechanics for jury selection has a component part, such as the slips here, that differentiate between white and colored.

Movant therefore asks that the Court reexamine the record in said case, and that the previous order be reversed and set aside.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error

[fol. 124] CERTIFICATE OF ATTORNEY

I hereby certify that I am attorney of record for the Plaintiff in Error, movant in the above and foregoing Motion for Rehearing; and

I further certify that said Motion for Rehearing is not being filed for the purposes of delay, I believe that in view of added emphasis being placed on Avery v. Georgia, 345, U.S. 559, the court should reach a different conclusion as a matter of law. I believe there is merit therein and that upon reexamination of the record by the court, that the decision heretogore rendered would be reversed and set aside.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 126]

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA

LEON DAVIS *v.* THE STATE — 41421

ORDER DENYING MOTION FOR REHEARING—
September 22, 1965

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

* * * *

[fol. 127]

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Case No. 41421

Writ of Error

From the Superior Court of Mitchell County

LEON DAVIS, PLAINTIFF IN ERROR

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR

NOTICE OF INTENTION TO APPLY TO THE SUPREME COURT OF GEORGIA FOR WRIT OF CERTIORARI—
filed September 28, 1965

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA:

You are hereby notified that it is the intention of LEON DAVIS, Plaintiff in Error, to apply to the Supreme Court of Georgia for the writ of certiorari to review the judgment of the Court of Appeals rendered and filed in the above stated case on September 8, 1965, in which case a motion for rehearing was denied on September 21, 1965. A complete copy of the record is hereby ordered.

/s/ B. Clarence Mayfield
Attorney for Plaintiff in Error
Leon Davis

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 129]

IN THE SUPREME COURT OF GEORGIA
ATLANTA

No. 23240

LEON DAVIS *v.* THE STATE

ORDER DENYING APPLICATION FOR WRIT OF CERTIORARI—
November 9, 1965

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur except Mobley, J., not participating for providential cause.

Bill of Costs, $15.00

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

Nov. 30, 1965

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that American Civil Liberties Union paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Henry H. Cobb
Clerk

Case No. 41421

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office Nov. 30, 1965.

/s/ (Illegible)
Deputy Clerk
Court of Appeals of Georgia

[fol. 130] [Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 131]

SUPREME COURT OF THE UNITED STATES

No. 1270 Misc., October Term, 1965

PHIL WHITUS AND LEON DAVIS, PETITIONERS

v.

GEORGIA

On petition for writ of Certiorari to the Court of Appeals of the State of Georgia.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 20, 1966

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1435, placed on the summary calendar and set for oral argument immediately following No. 918 Misc.

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SUPREME COURT, U. S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 650

PHIL WHITUS and LEON DAVIS,

Petitioners,

v.

THE STATE OF GEORGIA,

Respondent.

PETITIONERS' BRIEF

CHARLES MORGAN, JR.
Counsel for Petitioners
5 Forsyth Street, NW
Atlanta, Georgia 30303

Of Counsel:

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Constitutional Provisions Cited

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Petitioners hereby adopt the Table of Cases, Constitutional Provisions Cited, Statutes Cited, and Other Authorities Cited in their brief in No. 253 herein, and add thereto the following additional citations:

Reece v. *Georgia*, 350 U.S. 85 (1955) 7, 8

Mills v. *Alabama*, 384 U.S. 214 (1966) 8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 650

PHIL WHITUS and LEON DAVIS,

Petitioners,

v.

THE STATE OF GEORGIA,

Respondent.

PETITIONERS' BRIEF

Opinion Below

The Opinion of the Supreme Court of the State of Georgia in *Whitus* v. *The State* is reported at 222 Ga. 103 (1966). The Opinion of the Supreme Court of the State of Georgia in *Davis* v. *The State* is reported at 222 Ga. 114 (1966).

Jurisdiction

The judgment of the Supreme Court of Georgia in *Whitus* v. *The State* was entered on April 12, 1966. Rehearing was denied on May 5, 1966. The judgment of the Supreme Court of Georgia in *Davis* v. *The State* was entered on April 19, 1966. Rehearing was denied on May 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), petitioners having asserted below and asserting here the deprivation of their rights, privileges and immunities

claimed under the Constitution of the United States, and the validity of State statutes being drawn in question on the ground of their being repugnant to the Constitution of the United States.

Questions Presented

1) Whether a Negro criminal defendant can be indicted conformably with the Constitution of the United States when State law requires the jury commissioners of a county to select the names of prospective traverse jurors from the county tax receiver's tax digest and to maintain his tax digest on a racially segregated basis; and as subsidiary questions thereto, whether the mechanics of selection of traverse jurors required by state law make discrimination probable, and whether a traverse jury so selected would be unconstitutionally composed; and

2) Whether Sections 59-106 and 92-6307 of the Code of Georgia, when construed together, are repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and

3) Whether a Negro criminal defendant can be constitutionally tried by a traverse jury selected from a jury list which was made up, with reference to a pre-existing jury list admitted to have been unconstitutionally composed of names selected pursuant to state law from a tax digest maintained pursuant to state law on a racially segregated basis; and

4) Whether from the evidence adduced at the hearing in the trial court below there was shown a systematic exclusion of Negroes from the traverse jury which tried the peti-

tioners, Negro criminal defendants, they being thereby deprived of rights secured to them by the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

5) Whether Section 59-106 of the Code of Georgia, which requires that those persons selected for jury service be "upright and intelligent" establishes on its face and in its application a nonascertainable standard for jury selection and is unconstitutionally vague and therefore void, and, as a subsidiary question thereto, whether Sections 59-106 and 92-6307 of the Code when construed together are repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States; and

6) Whether the judgment of the Supreme Court of Georgia should be reversed and rendered, the petitioners being discharged due to the failure or refusal of the State of Georgia to comply with the order of the United States Court of Appeals for the Fifth Circuit, providing Georgia a period of eight months within which to reindict and retry petitioners by constitutionally composed grand and traverse juries.

Statutes Involved

The statutes involved are the same as those set forth in Petitioners' Brief in No. 253 herein.

Statement of the Case

Petitioners hereby adopt the statement of the case in Petitioners' Brief in No. 253 herein, and add thereto the following:

1. Proceedings Below

The petitioners were tried at the October 1965 term of Court, an array of jurors differing from that in April being put upon them. At trial they were convicted and again sentenced to death by electrocution.

Prior to their trials, petitioner Phil Whitus and petitioner Leon Davis both filed challenges to the array of jurors (R. 7, 44), on the ground that the said petit jury was, in fact, and by state law had to be illegally and unconstitutionally composed and drawn and was in derogation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and that the trial before the said petit jury would deprive them of due process of law and equal protection of law guaranteed them by Article III, Section 2, and the Fifth, Sixth and Seventh Amendments of the Constitution of the United States.

The Judge of the Superior Court of Mitchell County heard the evidence and arguments on the challenge to the array of traverse jurors on October 16, 1965 (R. 16-34, 59-71). The Judge of the Superior Court entered an order denying the challenges, and petitioners excepted to that judgment. That judgment was a final judgment, from which appeal lay to the Supreme Court of Georgia.

Petitioners timely filed their Bills of Exceptions with the Supreme Court of Georgia (R. 35, 72), preserving their constitutional grounds in the following language:

> 2. The court erred in dismissing the challenge to the array of petit jurors since it affirmatively appeared that 49% of the population of Mitchell County were Negroes and only 7% of the petit jury were of the Negro race.

Petitioners timely filed their motions for rehearing in the Supreme Court of Georgia (R. 37-41, 73-75), and these motions were denied on May 5, 1966 (R. 41, 76).

Denial of petitioners' motions for rehearing exhausted their State remedies.

2. Statement of the Facts

The evidence showed that ninety people had been called for service on the traverse jury, of whom at least seven (or eight per cent) were Negroes (R. 17, 60). It further showed that the petit jury list was prepared with reference to the previous petit jury list of the county (R. 21, 28, 63, 69), admitted to have been a list from which Negroes had been systematically excluded in *Whitus* v. *Balkcom*, 333 F. 2d 496 (1964), at page 500, and, as required by law (Ga. Code §59-106), from the tax digest of the county, which was maintained as required by law (Ga. Code §92-6307) on a racially segregated basis, and in accordance with custom on paper of different colors for the two races (R. 19-20, 61-62). There were no other sources for the names selected. As a rule, the commission accepted the determination of the commissioner in whose community the prospec-

tive juror resided as to his qualifications (R. 21-24, 28, 30, 63, 65, 67, 70).

The State asked each jury commissioner whether he personally purposely included or excluded any person for prospective petit jury duty service because of race, color, creed or national origin, and each one answered that he did not (R. 22, 28-29, 64, 69). It further appeared that all six county jury commissioners were white (R. 20-21, 62-63), and that the commissioners did use the tax digests for jury selection maintained upon a racially segregated basis as required by Georgia law (R. 19-22, 24, 28-29, 61-63, 66-67, 69-70). The commissioners stated that only those tax payers whom they knew personally were selected for the jury list, and that only those tax payers who were "upright" and "intelligent" were so selected (R. 21-22, 24, 29-30, 63-67, 69-70). No intelligence tests were given any tax payers, nor were their criminal records researched (R. 21, 29-30, 63, 70). The commissioners testified that there were more white tax payers than Negro and that there was a total of 600 names on the jury list (R. 23, 29, 65-66, 69). One commissioner guessed that 25-30% of the jury list was Negro, but stated this to be a "wild guess" adding that he had no certain knowledge of the exact percentages (R. 25, 67).

The portion of the Federal decennial census respecting the racial composition of Mitchell County (*1960 Census of Population,* Vol. 1, *Characteristics of the Population,* Part 12; Table 27, p. 12-123, previously submitted to the Court) was introduced by petitioners (R. 31-34). As theretofore held by the Court of Appeals of Georgia, *Whitus* v. *The State,* 112 Ga. App. 328, 145 S.E. 2d 83 (1965) (*Whitus and Davis* v. *State of Georgia,* No. 1270 Misc.), the trial

court, in effect, took judicial notice of this census and included it in its consideration of the case, as required by prior state decisions. See *Tift* v. *Bush,* 209 Ga. 769, 771, 75 S.E. 2d 805 (1953). This census shows, *inter alia,* that 10,206 people over the age of twenty-one years were included in the Mitchell County population. Of these, 4,706 were male, 2,702 being white and 2,004 (or 42 per cent of the adult male population) being Negro.

Argument

Petitioners hereby adopt the argument contained in Petitioners' Brief in No. 253 herein and allege that the same argument applies with respect to the selection of petit jurors.

The judgment in No. 253 herein was a final judgment. The Superior Court of Mitchell County denied petitioners' challenges to the array of grand jurors on April 19, 1965. This denial was a final judgment under Georgia law, Code Ann. Sec. 6-701. To preserve their remedies, petitioners appealed within thirty days from the denial to the Supreme Court of the State of Georgia. This appeal was transferred to the Court of Appeals of Georgia for hearing. There, the judgment was affirmed on September 8, 1965. The Supreme Court of the State of Georgia denied certiorari on November 9, 1965. Thereafter, petitioners petitioned this honorable Court.

Respondent contends that the order of the Court of Appeals of Georgia denying the challenges to the array of grand jurors is not a final judgment subject to review by this Court under 28 U.S.C. Sec. 1257 (3). Petitioners are of the opinion that *Reece* v. *Georgia,* 350 U.S. 85 (1955)

is entirely dispositive of respondent's contention. There, this Court considered the question of whether "a semi-illiterate Negro of low mentality," *Reece, supra,* p. 89, and without benefit of counsel, could realistically be said to have had an opportunity to raise objection to the composition of his Georgia grand jury prior to indictment. In determining that petitioner had not had such an opportunity, the Court brushed aside the objection that it had no jurisdiction over the grand jury issue, stating: "We have jurisdiction to consider all of the substantial Federal questions determined in the earlier stages of the litigation, ..." *Reece, supra,* p. 87. Cf. *Mills* v. *Alabama,* 384 U.S. 214 (1966).

Conclusion

The judgment of the Supreme Court of Georgia should be reversed and rendered with instructions that the petitioners be freed.

Respectfully submitted,

CHARLES MORGAN, JR.
Counsel for Petitioners
5 Forsyth Street, NW
Atlanta, Georgia 30303

Of Counsel:

P. WALTER JONES
B. CLARENCE MAYFIELD
MORRIS BROWN
LAUGHLIN MCDONALD
MELVIN L. WULF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 253

PHIL WHITUS and LEON DAVIS,
Petitioners,

v.

THE STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR PETITIONERS

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Texas v. *United States*, 34 L.W. 3376 (1966) 16

Whitus v. *Balkcom*, 299 F.2d 844 (5 Cir. 1962) .. 4
Whitus v. *Balkcom*, 370 U.S. 728 (1962) 5
Whitus v. *Balkcom*, 333 F.2d 496 (5 Cir. 1964), cert. den. 379 U.S. 931 (1965) 5, 19
Whitus v. *State*, 112 Ga. App. 328, 145 S.E.2d 83 (1965) 1, 5
Williams v. *Georgia*, 349 U.S. 375 (1955) 14

U.S. v. *Mississippi*, 380 U.S. 128 (1965) 15
U.S. ex rel. Goldsby v. *Harpole*, 263 F.2d 71 (1959) cert. den. 361 U.S. 838 (1959) 5
U.S. ex rel. Seals v. *Wiman*, 304 F.2d 53 (5th Cir. 1962) cert. den. 372 U.S. 975 (1963) 5

CONSTITUTIONAL PROVISIONS CITED:

Constitution of the United States:

Article III, Section 2 6
Fifth Amendment 6
Sixth Amendment 6
Seventh Amendment 6
Fourteenth Amendment 6, 17

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Constitution of the State of Georgia, 1868:

Article 5, Section XIII, 781, II 12

Constitution of the State of Georgia, 1877:

Article VI, Section XVIII, 997 n, Ga. Acts 1878-9, p. 34 12

STATUTES CITED:

United States Code:

Title 28 U.S.C. Section 1257(3) 2

Code of Georgia (1861):

Article 2, Section 3882, pp. 721-722 12

Georgia Code (1933):

Section 24-4525 6

Section 59-106 ..... 2, 3

Section 92-6307 ..... 2, 4, 8, 13

Judiciary Act of 1799, Vol. 1, 292-294, Section XXXVIII 12

OTHER AUTHORITIES CITED:

Cooper, Walter G., *The Story of Georgia,* Vol. III, 1938 13

Lester, Anthony, *Justice in the American South,* Amnesty International, 1 Mitre Court Buildings Temple, London, E.C. 4 (1965) 20

Justice, 1961 U.S. Commission on Civil Rights Report 21

Nelson, Jack, Los Angeles *Times,* June 13-17, 1965, p. 1 20

Page

U.S. Bureau of the Census, *U.S. Census of Population: 1960.* Vol. I, *Characteristics of the Population.* Part 12, Georgia. U.S. Government Printing Office, Washington, D.C., 1963 .. 7

Woodward, C. Vann, *A History of the South, Origins of the New South IX,* 1877-1913, L.S.U. Press, Baton Rouge, La., 1951 .....8, 9, 10

Woodward, C. Vann, *Tom Watson, Agrarian Rebel,* The Macmillan Company, New York, 1938 .....10, 11, 12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 253

PHIL WHITUS and LEON DAVIS,

Petitioners,

v.

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR PETITIONERS

Opinion Below

The Opinion of the Court of Appeals of Georgia is reported at 112 Ga. App. 328, 145 S.E. 2d 83 (1965).

Jurisdiction

The judgment of the Court of Appeals of Georgia was entered on September 8, 1965. Rehearing was denied on September 22, 1965. The Supreme Court of Georgia denied timely applications for writs of certiorari on November 9, 1965, motion for reconsideration in the case of Phil Whitus on November 16, 1965 and motion for reconsideration in the case of Leon Davis on November 29, 1965. The juris-

diction of this Court is invoked under 28 U.S.C., Section 1257(3), petitioners having asserted below and asserting here the deprivation of their rights, privileges and immunities claimed under the Constitution of the United States, and since the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

Questions Presented

1) Whether a Negro criminal defendant can be indicted conformably with the Constitution of the United States when State law requires the jury commissioners of a county to select the names of prospective grand jurors from the county tax receiver's tax digest, and the state law requires the tax receiver to maintain his tax digest on a racially segregated basis; and as subsidiary questions thereto, whether the mechanics of selection of grand jurors required by state law make discrimination probable, and whether a grand jury selected under such requirements of state law would be unconstitutionally composed; and

2) Whether Sections 59-106 and 92-6307, of the Code of Georgia, when construed together are repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and

3) Whether a Negro criminal defendant can be constitutionally indicted by a grand jury selected from a grand jury list which was made up, with reference to a pre-existing grand jury list admitted to have been unconstitutionally composed, of names selected pursuant to state law from a tax digest maintained pursuant to state law on a racially segregated basis; and

4) Whether from the evidence adduced at the hearing in the trial court below there was shown a systematic exclusion of Negroes from the grand jury which indicted the petitioners, Negro criminal defendants, they being thereby deprived of rights secured to them by the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

Statutes Involved

The statutes involved are the following sections of the Code of the State of Georgia (1933), as amended:

> 59-106. (816, 819 P.C.) Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.
>
> The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror,

such name shall be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1887, p. 31; 1892, p. 61; 1899, p. 44; 1953, Nov. Sess., pp. 284, 285; 1955, p. 247.)

92-6307. (1086) Entry on digest of names of colored persons.—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest. (Acts 1894, p. 31.)

Statement of the Case

1. Proceedings Below.

Petitioners, adult Negro men, were indicted by the Mitchell County, Georgia, Grand Jury (January Term, 1960) for the murder of James Eldridge "Peter" Glenn, an adult white man. Trial juries returned verdicts of guilty on January 13, 1960.

Petitioners subsequently filed unsuccessful motions for new trials, appeals to the Supreme Court of Georgia, and petitions for writs of certiorari in the Supreme Court of the United States. Questions relating to the racial composition of the grand and petit juries of Mitchell County, Georgia—except for a vague allusion in the petitions for writs of certiorari in the Supreme Court of the United States—were first raised in a petition for writ of habeas corpus in the United States District Court for the Southern District of Georgia. The petition was denied on the ground, among others, that a state remedy was available. The United States Court of Appeals for the Fifth Circuit affirmed. *Whitus* v. *Balkcom* (5 Cir., 1962), 299 F. 2d 844.

The Supreme Court, *per curiam,* vacated the judgment and remanded the case. *Whitus* v. *Balkcom,* 370 U.S. 728 (1962). Again the District Court dismissed the petition. On appeal, the Court of Appeals reversed, stating:

> [13] As in [U.S. ex rel.] Goldsby [v. Harpole, 263 F. 2d 71 (5 Cir. 1959), cert. den. 361 U.S. 838, 80 S.Ct. 58, 4 L. ed. 2d 78] and [U.S. ex rel.] Seals [v. Wiman, 304 F. 2d 53 (5 Cir. 1962), cert. den. 372 U.S. 975, 83 S.Ct. 741, 9 L. ed. 2d 729], the Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari, or otherwise, will be sufficient to afford the State an opportunity to take the necessary steps to reindict and retry the petitioners. Any such reindictment must of course be by a grand jury from which Negroes have not been systematically excluded, and any such retrial must be before a jury from which Negroes have not been systematically excluded, or before some court or tribunal so constituted as not to violate the petitioner's constitutional rights. For the guidance of the parties, the Court expresses the present opinion that if petitioners are reindicted and retried and if any question should arise as to the legality or constitutionality of such indictment or trial, that should be decided not upon the present petition but in the regular course by the Courts of the State of Georgia, subject to possible review by the Supreme Court of the United States. (*Whitus* v. *Balkcom* [5 Cir. 1964], 333 F. 2d 496, 510.)

Petitioners were reindicted by the Grand Jury of Mitchell County, Georgia, on April 12, 1965 (R. 5-6, 67-68). Prior to their indictment, however, and in accordance with

Georgia practice, Messrs. Whitus and Davis filed challenges to the array of grand jurors on the ground that the grand jury was, in fact, and by state law had to be, illegally and unconstitutionally composed and drawn and was in derogation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and that the proceedings before, and indictment by, the grand jury would deprive them of due process of law and equal protection of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States and by Article III, Section 2, and the Fifth, Sixth, and Seventh Amendments of said Constitution (R. 1-3, 69).

The Judge of the Superior Court of Mitchell County heard the evidence and arguments on April 16, 1965, and entered an order denying the challenges on April 19, 1965 (R. 7, 50). From that final judgment an appeal lay.

Petitioners' appeal to the Supreme Court of the State of Georgia was transferred to the Court of Appeals of Georgia for hearing, pursuant to the provisions of Section 24-4525 of the Code of Georgia (1933), as amended. There the judgment was affirmed on September 8, 1965 (R. 56-57). The Supreme Court of the State of Georgia denied certiorari on November 9, 1965 (R. 66).

2. Statement of the Facts.

In February, 1965, the six white members of the Mitchell County Jury Commission—there were no Negro commissioners (R. 29)—met to revise the jury lists (R. 27, 33). The commissioners had the tax digest and the old jury roll with them (R. 21, 27) both of which they used (R. 48).

Prior to 1965 tax returns were on different colored paper —yellow for Negroes, white for whites (R. 44, 45). They are still racially designated as are tax digests (R. 42).

Each commissioner testified he did not purposely exclude Negroes on the basis of their race (R. 26, 30, 36). They said racial designations on tax records did not influence them in their selections (R. 45, 47, 48). The 500 to 600 persons chosen (R. 32) were sought as the most intelligent, upright citizens of the community over 21 years of age (R. 30). But no intelligence tests were given them nor was their educational background a factor (R. 31). Indeed, a member of the jury commission could not describe the mechanics of selection (R. 24), the conversations of the commissioners (R. 22-23), or whether or not the old jury lists were used, although he thought they were (R. 25). After stating that he complied with constitutional requirements in the selection of jurors he didn't know what the requirements were (R. 25). Another commissioner had no idea of the number of Negroes on the rolls (R. 32).

Although only 3 of 90 jurors summoned were Negroes (R. 40) the 1960 *Census of Population,* Vol. I *Characteristics of the Population* part 12, Table 27, p. 12-123 discloses that 10,206 people over the age of 21 years reside in Mitchell County, Georgia of whom 4,706 were male, 2,004 (42%) of whom were Negroes.

Prior to the April Grand Jury which indicted Messrs. Whitus and Davis the three senior members of the Mitchell County Bar (R. 14, 17) could recall only 1 Negro on a grand jury and 2 Negroes on a petit jury list (R. 8-13, 14-15, 16-19). The first remembered Negro Mitchell County Grand Juror (1 Negro of 19 men) served in this case (R. 38, 39, 41).

ARGUMENT

I.

The Use of Tax Digests Containing Racial Designations as the Source for Names of Grand Jurors Provided the Opportunity for Discrimination Rendering the Indictments of Petitioners Unconstitutional.

1. History of the statutes involved.

It was from tax digests required to be racially segregated by Section 92-6307 of the Georgia Code that the names of grand jurors were selected. The progenitor of this section was enacted in December of 1894 as part of a Voters' Registration bill. The inherent design of the voter registration provision was disfranchisement of Negroes. A side effect, since jurors were selected from the same tax lists as those from which persons who had paid their taxes were qualified as electors, was the exclusion of Negroes from jury duty.

In one of the most plaintive of the appeals made to President Cleveland by distraught Southern Democrats, Governor William J. Northern of Georgia wrote in September, 1893, saying, "the conditions of this State are fearful and threatening" and are engendering "a lack of confidence in the party in power." His greatest fear was of the growing power of Populism. "Every election held in this State for the past three (3) months has gone against the Democrats and in favor of the Populists," he wrote. Woodward, C. Vann, *A History of the South, Origins of the New South,* IX, 1877-1913, L.S.U. Press, 1951, p. 273.

That the Populist movement was a full scale assault on the Democrats, heirs of the old Southern Bourbon Dynasty, is self evident.

"The political strategy of Southern Populists was based on combinations and alliances along regional, class, and racial lines—first, an alliance between South and West; second, a combination of farmers and city and factory laborers; and third, a political union with Negro farmers and laborers within the South. Every phase of this strategy was a challenge to the new-South system which had sought to divide all the elements Populists were trying to unite." *Ibid.*, p. 252.

"The bolder of them [i.e. Populists] challenged the cult of racism with the doctrine of common action among farmers and workers of both races. The very existence of the third party, was, of course, a challenge to the one-party system as well as to white solidarity." *Ibid.*, p. 249.

Even though the Populists had been defeated in the 1892 elections, their efforts through such men as Tom Watson were being renewed and their cause advanced.

"Tom Watson spoke during the summer of 1893 in thirty-five Georgia counties to crowds that he estimated to total 150,000 people." *Ibid.*, p. 273.

To meet the threat of a general Populist victory in the elections of 1894, the various Southern states took their separate steps.

"One refinement of old-party methods took the form of changes in election laws—usually described as reforms. The Sayre election law of Alabama, for example, prohibited assistance in marking ballots, thus providing means of disfranchising thousands of illiterate voters, white as well as black. (Clark, *Populism in Alabama,*

146; *Montgomery Advertiser,* August 10, 1894.) The Walton law, passed by the Democrats of the Virginia Legislature in 1893, likewise discriminated against the unlettered voter. (Sheldon, *Populism in the Old Dominion,* 106-108.) A new registration law adopted in Georgia the following year placed in the hands of a Democratic registration committee the power to draw up lists of qualified voters. The potentialities of this law were demonstrated in Richmond County, in Watson's district, where more than one third of the Negroes registered (almost as many as whites) were listed as 'just attained the age of 21.'" *Ibid.,* p. 275.

Prior to the elections of 1894

"the Democratic machine of Augusta, more desperate than in 1892, determined to win the congressional election in November, 1894, by any means possible. A description of the methods used—the drunken Negro repeaters, the ballot-box stuffing and burning, intimidation, bloodshed, and bribery—is unnecessary, for the scene was merely a repetition of that of 1892 on a more extensive scale; much more was required to defeat Watson in 1894." Woodward, C. Vann, *Tom Watson, Agrarian Rebel,* N.Y. The Macmillan Company, 1938, pp. 269-70.

The "much more" that Woodward speaks of was a court ruling that held registration unnecessary in congressional elections. The Populists sought, unsuccessfully, an injunction restraining unregistered voting. *Ibid.,* pp. 269-270.

Watson was defeated amid howls of "unfair" and "fixed". The Voter's Registration bill of 1894, the response to this

election, was a "final solution" to the problem of the Negro vote. It was but one of the last entries on the journal of white supremacy. Earlier, in June, 1890, Congressman Henry Cabot Lodge introduced a bill for Federal control of elections known popularly as the "Force bill." The South was outraged.

> "The Lodge bill caused more alarm and excitement in the South than any Federal measure since 1877. (For example, Charleston *News and Courier,* September 24, 1890; Jacksonville *Times-Union,* July 25, 1890; Atlanta *Constitution,* quoted in Richmond *State,* July 19, 1890; Jackson *Clarion-Ledger,* December 5, 1890.) 'Not for twenty years has the public mind been so much disturbed,' declared the Richmond *Dispatch* in a five-column, front page editorial on the subject! 'The South stood one reconstruction,' said a Mississippi paper, 'It remains to be seen whether it will meekly submit to another.' The Atlanta *Constitution* called for a revival of 'that glorious era' when 'the indomitable spirit of the freemen of Georgia was equal to the emergency . . . . what we did twenty years ago we can do again' (quoted in Richmond *State,* July 19, 1890). See also Richmond *Dispatch,* July 24, 1890; Jackson *Clarion-Ledger,* December 5, 1889." *Ibid.,* pp. 254-255.

The old party Democrats could, however, put the Force bill to good use.

> "The practical uses of the alarm over the Force bill were not lost on the old party. 'Its effect will be to draw the color line more intensely and to weld the South more solidly together,' observed a Richmond Democrat (Captain Sol Cuthens, in Richmond Dis-

> patch, July 24, 1890). 'But for the Force bill,' admitted a Democratic paper, 'the South might possibly have listened to the appeals of some of the new parties.' But so long 'as that bill threatens her with all the horrors of reconstruction days,' white solidarity was assured. *Ibid.*, October 8, 1892." *Ibid.*, p. 255.

The predecessor of § 92-6307 was the South's final reply to the Force bill, and its rhetoric harangued the Negro, the poor and the unlettered until it was repealed in part in 1966.

The racially designated tax digest when used with the subjective standards for jury selection established in Georgia Law—"upright and intelligent citizens . . . serve as jurors, . . . , the most experienced, intelligent and upright citizens . . . serve as grand jurors"—offers an almost foolproof system for legalizing racial discrimination.

Prior to the Civil War the names of jurors were furnished by the tax collector (Judiciary Act of 1799, Vol. 1, 292-294, Section XXXVIII). By 1861 names were selected from the books of the Tax Receiver by the justices of the Inferior Court of the Counties. Grand jurors were to be "able, discreet and qualified" (Code of Georgia 1861, Article 2, Section 3882, pp. 721-722).

In 1868 the requirement that jurors be "upright" and "intelligent" was placed in the state constitution (Constitution of the State of Georgia (1868), Article 5, Section XIII, 781, II). By 1877 jurors were required to be "the most experienced, intelligent and upright men" (Constitution of the State of Georgia (1877) (Article VI, Section XVIII 997 n, Georgia Acts 1878-9, p. 34). The 1877 convention had been concerned with Negro voting. Dr. Sam Small,

who reported the constitutional convention of 1877, put it succinctly in an address to the Georgia Bar Association in June of 1927. The convention's purpose was "so—to allocate the elective franchise as to secure white supremacy and yet not fall into conflict with the newly attached Negro suffrage amendments of the Federal Constitution in support of them" (Cooper, Walter G., *The Story of Georgia,* Vol. III, 1938, p. 259). For three decades prior to 1894 the mind of the white south was made up. It intended to deprive Negroes of their civil rights. By the year of adoption of the statute questioned here lynching of Negroes was reported weekly and often daily. Soon *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) would brand segregation upon the body politic. The statute in question was a part of that program.

2. Racial identification coupled with vague and subjective standards of juror selection affords an unconstitutional mechanism for racial discrimination.

The constitutionality of Section 92-6307 of the Georgia Code was upheld in *Brookins* v. *State,* 221 Ga. 181, 144 S.E. 2d 83, 89 (1965), the Supreme Court of Georgia stating:

> The fact that the names of Negroes were segregated from those of whites on the tax digests, and the fact that the names of female Negroes were not entitled "Miss" or "Mrs.", as were the names of white females do not show that the Negroes were added to or excluded from the jury lists solely because of their race.

The court decided that the evidence in its entirety did not warrant the conclusion that Negroes had been excluded from grand and petit juries on the basis of race.

But *Avery* v. *Georgia,* 345 U.S. 559, 562 (1952) condemned the opportunity to discriminate. As Mr. Chief Justice Vinson said:

> Even if white and yellow tickets were drawn from a jury box without discrimination, opportunity was available to resort to it in other stages of the selection process.

In Georgia the opportunity is still present. The yellow and white slips in *Avery* have at least a kissing kinship with yellow and white tax returns in Mitchell County. As *Avery* holds, the opportunity for discrimination, coupled with the history of exclusion of Negroes from the juries of certain counties, suffices here.

In *Avery* at p. 562, Mr. Justice Frankfurter, concurring, said: "We may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips were used." *Id.* at 564. Writing for the Court in *Williams* v. *Georgia,* 349 U.S. 375, 382 (1955), he concluded that, "it was the system of selection and resulting danger of abuse which was struck down in Avery and not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists."

Racial records and subjectively vague standards—"uprightness," "intelligence," "experience"—make discriminatory juror selection a near certainty. This Court is aware of the inherent vice of the parochial jury commissioner.

Discretion itself flies in the face of the selection for jury duty of a true cross-section of the population. Condemna-

tion of discretion in the hands of state voting officials is at the heart of *United States* v. *Mississippi,* 380 U.S. 128 (1965) and *Louisiana* v. *United States,* 380 U.S. 145 (1965). That same discretion coupled with racially separated lists should be even more forcefully condemned here (cf. *Smith* v. *Texas,* 311 U.S. 128 (1940)).

A state must not provide unnecessary "opportunities to discriminate." In *Anderson* v. *Martin,* 375 U.S. 399 (1964), this Court ended the racial designation on the ballot of all candidates for public office. There was, of course, no positive proof that these racial designations in any way influenced the voting patterns of Louisiana citizens. Nonetheless, the Court held that the designations were unconstitutional because the state was indicating that race was "an important—perhaps paramount—consideration" in a voter's choice. 375 U.S. 399, 402 (1964). The Court added that a state cannot "encourage its citizens to vote for a candidate solely on account of race. Cf. *Steele* v. *Louisville & N. R. Co.,* 323 U.S. 192, 203 (1944). And that which cannot be done by express statutory prohibition cannot be done by indirection." 375 U.S. 399, 404 (1964). In the jury situation it is clear that a state cannot encourage, or even permit, its jury commissioners to select juries on the basis of race. But the Georgia procedure both permits and encourages selection along racial lines.

This practice is the more reprehensible because it affects the appearance of fairness in the administration of justice, the "imperative of judicial integrity" [1] and this Court has held unconstitutional other burdens, similar to those imposed by Georgia, on Negro criminal defendants (cf. *Hamil-*

[1] *Mapp* v. *Ohio,* 367 U.S. 643, 659 n.53 (1961).

ton v. *Alabama,* 376 U.S. 650 (1964) and *Johnson* v. *Virginia,* 373 U.S. 61 (1963)).

While the practice of selecting juries from racially segregated tax lists has never been considered by the Supreme Court of the United States, the practice of using unsegregated tax lists has. In *Brown* v. *Allen,* 344 U.S. 443 (1952), and in *Speller* v. *Allen,* 344 U.S. 443, 477 (1952), the court held that the use of tax digests, silent as to designation of race, in the selection of jurors in Vance and Forsyth Counties, North Carolina, satisfied the requirements of "due process" and "equal protection" contained in the Fourteenth Amendment.[2]

There was no evidence presented, nor were any charges made, that the tax digests themselves contained any classification as to race as in the instant case, nor did the court consider the issue.

"Petitioner offered no evidence to support his charge of limitation against the jury service of Negroes, except the fact that fewer Negroes than whites, having regard for their proportion of the population, appeared on the jury panels." *Brown* v. *Allen, supra,* p. 467.

The practice of maintaining state records on a segregated basis has been passed upon by the Supreme Court of the United States. In the recent case of *Hamm* v. *Virginia*

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[2] Whether this practice would be upheld in a direct challenge based upon economic discrimination was excluded from the Court's consideration and is questionable. Cf.: *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Eskridge* v. *Washington,* 357 U.S. 214 (1958); *Lane* v. *Brown,* 372 U.S. 477 (1963); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Harvey* v. *Mississippi,* 340 F.2d 263 (1965). No such challenge is at issue here. See also *Harper* v. *Virginia State Board of Elections,* 34 L.W. 4305 (1966) and *Texas* v. *United States,* 34 L.W. 3376 (1966).

State Board of Elections, 230 F. Supp. 156 (E.D. Va. 1964), aff'd *per curiam sub nom. Tancil* v. *Woolls,* 379 U.S. 19 (1964), a three-judge District Court declared that Virginia statutes requiring that lists of voters and taxpayers be kept in separate books according to race violated the Fourteenth Amendment. The District Court stated that it was now axiomatic that no State can directly or casually promote a distinction in the treatment of persons solely on the basis of their color. To be within the condemnation, the governmental action need not effectuate segregation of facilities directly. Cf. *Anderson* v. *Martin,* 375 U.S. 399, 402 (1964). The result of the statute or policy must not tend to separate individuals by reason of difference in race or color. No form of state discrimination, no matter how subtle, is permissible under the guarantees of the Fourteenth Amendment. 230 F. Supp. at 157-158.

II.

Negroes Were, in Fact, Systematically Excluded From the Grand Jury Which Indicted Petitioners.

This Court has vigorously condemned the outright exclusion and mere token inclusion of Negroes on juries. See *Strauder* v. *West Virginia,* 100 U.S. 303 (1880) (Negroes prohibited by statute); *Neal* v. *Delaware,* 103 U.S. 370 (1881) (No Negroes for jury service); *Bush* v. *Kentucky,* 107 U.S. 110 (1883) (Negroes prohibited by statute); *Norris* v. *Alabama,* 294 U.S. 587 (1935) (No Negroes called within memory); *Hollins* v. *Oklahoma,* 295 U.S. 394 (1935) (No Negroes called for jury service); *Hale* v. *Kentucky,* 303 U.S. 613 (1938) (No Negroes called for 30 years); *Pierre* v. *Louisiana,* 306 U.S. 354 (1939) (One Negro called within memory); *Smith* v. *Texas,* 311 U.S. 128 (1940)

(Eighteen Negroes called in 7 years); *Hill* v. *Texas,* 316 U.S. 400 (1942) (No Negroes called for 16 years); *Patton* v. *Mississippi,* 332 U.S. 463 (1947) (Three Negroes called in 30 years); *Cassell* v. *Texas,* 339 U.S. 282 (1950) (Twenty-one Negroes served in 6 years); *Hernandez* v. *Texas,* 347 U.S. 475 (1954) (No Mexicans served for 25 years); *Reece* v. *Georgia,* 350 U.S. 85 (1955) (Six Negroes called in 18 years); *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958) (One Negro served in 18 years); *Arnold* v. *North Carolina,* 376 U.S. 773 (1964) (One Negro served in 24 years).

That the 6 white jury commissioners systematically excluded Negroes from the Grand Jury here is clear. Three of 90 jurors summoned were Negroes in a county where Negroes comprised 42 percent of the over age 21 male population. One Negro served on the grand jury, he apparently being the first Negro to so serve. The source of names was the segregated tax digest and the old jury list, a list already condemned for its racial exclusiveness.

The state offered no evidence of the number of Negroes eligible on tax rolls. The discrepancy was not explained by educational differences, economic distinctions, criminal records, a lack of intelligence, uprightness, or experience. No explanation at all was offered by the state. The commissioners merely said that they did not discriminate. This unsupported allegation has been held insufficient for rebuttal of a prima facie case. See *Norris* v. *Alabama, supra.* See also *Avery* v. *Georgia, supra,* which focused on opportunity to exclude rather than on exclusion or intention.

Here there was a history of exclusion coupled with actual exclusion. The convictions must be reversed.

III.

The Judgments Should Be Reversed and Rendered and the Petitioners Freed.

Since 1959 the petitioners have awaited trial. The United States Court of Appeals for the Fifth Circuit ruled that Georgia might reindict and retry petitioners by a jury from which Negroes had not been systematically excluded. *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964). This Georgia chose not to do. Ordinarily this Court will merely set aside a conviction providing a new trial. As this Court stated in *Hill* v. *Texas, supra* at 406:

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements . . . ."

Similar language is contained in *Patton* v. *Mississippi, supra* and *Eubanks* v. *Louisiana, supra.* And the Court of Appeals for the Fifth Circuit certainly had this in mind in its ruling in 1964. Georgia, not the petitioners, had the burden of providing fairly selected juries for the retrial. This Georgia did not do.

Justice in Mitchell County, Georgia is as white as the marble on a courthouse facade. This court knows of the "grisly 'Hobson's Choice'" (*Whitus* v. *Balkcom,* 333 F.2d 496, 499 (5th Cir. 1964)) much of the South provides a Negro criminal defendant on trial for his life.

The county courthouse has always been a seat of power in the South. Yesterday Negroes rarely went there. When they went there it was to pay taxes or purchase a license or be a witness or be tried. Tomorrow they may go there

to vote or serve on juries or, perhaps, to work, or practice law, or see a friend. But that tomorrow—like so many of the South's tomorrows—will never come if segregated justice continues. "The Deep South remains true to its heritage. The segregation of the machinery of justice, police, judges, courts and juries, remains. But really statistical evidence is unnecessary. One need only enter a southern courtroom to see discrimination at work." Lester, Anthony, *Justice in the American South,* Amnesty International, 1 Mitre Court Buildings Temple, London, E.C. 4 (1965), pp. 12-13.

All-white justice as it exists in sections of the South makes heroes of killers, rallying points of men accused of heinous crimes. Philadelphia and Jackson, Mississippi, law men and fertilizer salesmen, Selma and Birmingham Klansmen, bombers, burners, and sharpshooters strike terror in the hearts of Negro citizens seeking to free themselves from the vestiges of slavery.

Any consideration of the systematic exclusion of Negroes from juries requires recognition of the totality of the system of segregated justice. For an excellent contemporary review of segregated justice in the South see Nelson, Jack, "Jim Crow Justice," Los Angeles *Times,* June 13-17, 1965, p. 1 (a series of articles).

The law has been clear for 87 years but ". . . the problem of racial exclusion from jury service is relatively widespread and, in certain areas, deeply entrenched. The serious and continuing nature of the problem is revealed by the frequency of cases in which the issue of jury exclusion is raised and by local situations which the facts in those cases disclosed; by the plain statements of judges and offi-

cial observers; and by various field studies conducted by the Commission's staff." *Justice,* 1961 U.S. Comm. on Civil Rights Report, p. 90.

Courts technically rid the nation of legally enforced segregation in public education and public life. But racial segregation dies hard—as hard in courts as in schools. And litigation is by its nature slow, much slower than a march from Selma to Montgomery or a few weeks on the streets and sidewalks and in the jails of Birmingham.

Lawyers and judges know—or, at least hope—that the conflicts of men can be best settled in court. But it is their duty to make certain courts are open and fair—and above suspicion. In the Deep South, courts and the Bar have failed miserably but not irretrievably to perform their duties under the Constitution and to make state courts instruments for peaceful social change rather than repression. But who could expect the relatives and friends of Phil Whitus and Leon Davis to trust the law? And if they are ever asked either in the South or in some ne.. far away city to take their struggle out of the streets and into the courts, who can blame them for cynicism?

If, and when, juries in the South reflect the broad base required of them by the Constitution of the United States, the Negro lawyer in the South may find his practice includes the personal injury cases that now find their way to the white lawyer on the other side of town. Indeed, the racial political cavortings of white lawyers may become more subdued.

A moderate newspaperman may be able to editorialize on racial matters without fear of an all-white jury and a libel verdict in non-racial cases.

The Negro workman may find that his broken leg is as valuable to an insurance company or a jury as the broken leg of the white man who works by his side.

And most importantly the hundreds and thousands of Negro men and women who might have entered guilty pleas rather than exercise a "grisly 'Hobson's Choice'" may exercise their right to trial by jury.

Negro neighborhood crime rates may decline, for to Negro jurors the life and sanctity of the Negro neighborhood will be important.

Removal of civil rights cases from state courts will decline, for, as state courts become fair tribunals, they will be used by Negro people.

The working of the Federal system will be enhanced, for, by strengthening state courts—by making them fair—the doctrine of Federalism is itself strengthened. Courts no less than state legislatures are an instrumentality of states' rights—or wrongs. The jury system is the bulwark of liberty. It has been weakened in a proportion that equals, almost exactly, the extent to which it has been perverted by the exclusion from it of racial and other groups.

The freeing of these two defendants—and could they expect less for they have, after all, served 7 years in jail without a fair trial—would accord with the mandate of the Fifth Circuit. It could also move many Southern courts to eliminate racial discrimination in the administration of justice.

Conclusion

The judgment of the Court of Appeals of Georgia should be reversed and rendered with instructions that the petitioners be freed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 253

PHIL WHITUS AND LEON DAVIS,

Petitioners

VS.

STATE OF GEORGIA,

Respondent

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia under review here, and which affirmed a ruling of the trial court denying petitioners' challenge to the array of grand jurors, is reported as *Whitus* v. *State,* 112 Ga. App. 328, 145 S.E. 2d 83 (1965), cert. granted, 384 U.S. 1000, 16 L. Ed. 2d 1014 (1966). Previous decisions of the Supreme Court of Georgia affirming the first conviction of petitioners are reported as *Davis* v. *State,* 216 Ga. 110,

114 S.E. 2d 877 (1960), and *Whitus* v. *State,* 216 Ga. 284, 116 S.E. 2d 205 (1960), cert. den. 365 U.S. 831, 5 L. Ed. 2d 708 (1961). The decision of the Court of Appeals for the Fifth Circuit refusing to set aside the first conviction on habeas corpus, is reported as *Whitus* v. *Balkcom,* 299 F. 2d 844 (C.A. 5th 1962), vacated and remanded, 370 U.S. 728, 8 L. Ed. 2d 803 (1962). On remand, that Court set aside the first conviction. *Whitus and Davis* v. *Balkcom,* 333 F. 2d 496 (C.A. 5th 1964), cert. den. 379 U.S. 931, 13 L. Ed. 2d 343 (1964). Subsequent to rendition of the decision under review, petitioners were tried, convicted, and sentenced to death. The opinions of the Supreme Court of Georgia affirming those convictions are reported as *Whitus* v. *State,* 222 Ga. 103, 149 S.E. 2d 130 (1966), reh. den. May 5, 1966; *Davis* v. *State,* 222 Ga. 114, 149 S.E. 2d 130 (1966) reh. den. May 5, 1966. Petition for certiorari is now pending with respect to these decisions (No. 519 Misc.).

JURISDICTION

Petitioners rely upon 28 U.S.C., Sec. 1257 (3). Respondent denies that jurisdiction exists, for the reason that the judgment sought to be reviewed is not final.

QUESTIONS PRESENTED

(1) Whether a decision of a state court overruling a challenge to the array of grand jurors in a criminal case is a final judgment subject to review under 28 U.S.C.A., Sec. 1257 (3).

(2) Whether murder indictments of the two Negro defendants should be abated because of alleged racial discrimination in the selection of the grand jury, alleged to consist of (a) A disproportionate number of Negroes

on the grand jury as compared to the Negro population of the County; and (b) The existence of state statutes requiring that the names of prospective jurors be selected from the county tax digest, and that the names of colored and white taxpayers be made out separately on the tax digest.

(3) Whether, assuming the indictments should be set aside for either or both of the reasons above stated, the petitioners should stand discharged and acquitted, or should be held for reindictment and retrial.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

These are as set forth in Petitioners' Brief.

STATEMENT

Petitioners were indicted for murder at the 1960 January Term of Mitchell County, Georgia, Superior Court. They were tried, convicted, and sentenced to death. These convictions were affirmed on appeal by the Supreme Court of Georgia. *Davis* v. *State,* 216 Ga. 110, 114 S.E. 2d 877 (1960); *Whitus* v. *State,* 216 Ga. 284, 116 S.E. 2d 205 (1960). This Court denied certiorari, 365 U.S. 831, 5 L. Ed. 2d 708 (1961).

Habeas corpus was then instituted in the United States District Court for the Southern District of Georgia, raising for the first time the contention that racial discrimination had been practiced in the selection of the grand jury indicting petitioners and the petit jury trying them. Relief was denied, and the Court of Appeals for the Fifth Circuit affirmed. *Whitus* v. *Balkcom,* 299 F. 2d 844 (C.A. 5th 1962), remanded, *Whitus* v. *Balkcom,* 370

U.S. 728, 8 L. Ed. 2d 803 (1962). On remand, the district court again denied relief, but the Fifth Circuit reversed. *Whitus and Davis* v. *Balkcom,* 333 F. 2d 496 (C.A. 5th 1964). Noting that the state had conceded the question of discrimination, but relied instead on waiver,[1] the Fifth Circuit held, applying the rational of *Fay* v. *Noia,* 372 U.S. 391, 9 L. Ed. 2d 837 (1964), that waiver could not be imputed from the failure of court-appointed counsel to raise the issue at the trial. The Court reasoned that Negro defendants could not constitutionally be put to the choice of choosing between a jury improperly constituted and one prejudiced by the challenge being made in their presence. With respect to a retrial, the Court held:

> "As in Goldsby and Seals, the Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari, or otherwise, will be sufficient to afford the State an opportunity to take the necessary steps to reindict and retry the petitioners. Any such reindictment must of course be by a grand jury from which Negroes have not been systematically excluded, and any such retrial must be before a jury from which Negroes have not been systematically excluded, or before some court or tribunal so constituted as not to violate the petitioners' constitutional rights. For the guidance of the parties, the Court expresses the present opinion that if petitioners are reindicted and retried and if any question

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[1]As stated by the Fifth Circuit: "The factual question of the existence of the custom of systematic exclusion of Negroes from the Mitchell County juries is not at issue. The Appellee relies solely on the doctrine of waiver." *Whitus* v. *Balkcom,* supra.

> should arise as to the legality or constitutionality of such indictment or trial, that should be decided not upon the present petition but in the regular course by the Courts of the State of Georgia, subject to possible review by the Supreme Court of the United States." 333 F. 2d at 510.

This decision was rendered June 18, 1964. This Court denied certiorari, 379 U.S. 931, 13 L. Ed. 2d 343 (1964). Judgment was entered on the mandate by the district court on January 18, 1965.

Mitchell Superior Court convenes in regular term only twice each year, in April and October,[2] and alleging that the case was to be submitted to a newly-impaneled grand jury at the 1965 April term, petitioners filed challenge to the array of grand jurors on April 10, 1965. The challenge was heard on April 16, prior to the trial.[3] By way of evidence, petitioners relied upon testimony tending to show that prior to the April Term, 1965, no Negro, with the possible exception of one, had ever served on the grand jury, (R. 8-21) and the census figures showing that of the 10,206 persons in Mitchell County over 21 years of age, 4,480 were colored. The state's evidence, however, showed that, pursuant to the

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[2]See Ga. Laws 1966, p. 3498.

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[3]In Georgia, the first week of a term of superior court customarily is devoted to civil cases and grand jury deliberations. The grand jury usually completes its work during the first week, and the second week is devoted to the trial of criminal cases, both those indicted the preceding week as well as those pending from prior terms. The challenge to the array of grand jurors was presented at the beginning of the first week when the grand jury was convened.

mandate of the Fifth Circuit, the jury commissioners had revised the jury lists in February of that year (R. 26). At the April Term, of the 33 jurors drawn for grand jury service, 2 were Negroes, but one did not appear[4] and only one actually served (R. 38). Of the 90 jurors called for the traverse jury, at lease seven were Negroes.[5]

Also complained of in the petition for certiorari are the Georgia statutes requiring that the jury lists be made up of names selected from the County tax receiver's records, Code Sec. 59-106, and that the names of colored and white taxpayers be made out separately on the digest. Code Sec. 92-6307. In this connection, the evidence showed that the revised jury lists from which the grand and traverse juries serving at the 1965 April Term were drawn had been selected from the 1964 tax digest as distinguished from the tax returns (R. 21, 27, 33). Prior to the calendar year 1965, the return sheets themselves, furnished all counties by the State Revenue Department, Code Sec. 92-6302, were white for white taxpayers, and yellow for colored taxpayers, (R. 42); however, the jury commissioners were apparently not familiar with this fact (R. 45). Similarly, although the tax receiver, pursuant to Code Sec. 92-6307, placed a "c" by the names of colored taxpayers on the digest (R. 42), the jury commissioners were not even aware of this fact (R. 45-49).

While Georgia law requires that the names of all

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[4]R. 40. A grand jury under Georgia law consists of not less than 18 nor more than 23 persons. Code Sec. 59-202. Traditionally, 30 or so are drawn in anticipation of some not appearing.

[5]It was so stipulated by counsel at the trial in October, subsequent to the decision of the Court of Appeals now under review.

jurors selected by the jury commissioners be placed on the minutes of the Court, Code Sec. 59-109, petitioners made no effort to introduce these minutes into evidence for the purpose of questioning Court officials as to which ones thereon were Negroes, nor was there any effort to prove that there were any substantial number of Negroes whose names appeared on the tax books and who were qualified as to experience, intelligence and uprightness, as required by Georgia law, Code Sec. 59-106. The only evidence as to the number of Negroes on the jury lists came at hearing on the challenge to the array of petit jurors at the trial, where witness W. H. Grogan, a jury commissioner, testified in response to a question from counsel for petitioner Whitus that in his estimate, of the 600 names on the revised jury lists, 25 to 30 per cent were Negro.[6]

The trial judge overruled the challenge to the array of grand jurors, and direct appeal was taken to the Supreme Court of Georgia pursuant to Georgia law permitting interlocutory appeals from judgments which would have been final "if rendered as claimed for." Code Ann. Sec. 6-701. Because of the pendency of these appeals, the cases were not tried at the April term.

The Supreme Court transferred the cases to the Court of Appeals without opinion on May 26, 1965, and on September 8, the Court of Appeals affirmed the ruling of the trial court. *Whitus* v. *State; Davis* v. *State,* 112 Ga. App. 328, 145 S.E. 2d 83 (1965). This Court granted

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[6]See testimony of Mr. W. H. Grogan, in the Transcript of Record in the Whitus case, as transmitted to the Supreme Court of Georgia, and with respect to which certiorari is now pending in this Court, No. 519 Misc.

certiorari on June 20, 1966, 384 U.S. 1000, 16 L. Ed. 2d 1014 (1966).

In the meantime, following affirmance by the Court of Appeals of the overruling of the challenge to the array, the cases came on for trial at the October Term, the Davis case being tried on October 18, and the Whitus case on October 19, 1965, resulting in convictions and sentences of death in both cases. With respect to the challenge to the array of petit jurors, the testimony previously adduced in connection with grand jury challenge was stipulated by counsel. Jury Commissioner Campbell also testified to the effect that Negroes constitute approximately 30% of the taxpayers in the County,[7] and that in his estimate, approximately 25 - 30% of the names on the jury lists. There was also testimony that in November, 1959, the jury lists had been revised, and the names of 26 Negroes placed thereon.

The convictions were affirmed by the Supreme Court of Georgia. *Whitus* v. *State,* 222 Ga. 103, 149 S.E. 2d 130 (April 12, 1966), reh. den. May 5, 1966; *Davis* v. *State,* 222 Ga. 114, 149 S.E. 2d 130 (April 19, 1966), reh. den. May 5, 1966.

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[7]Actually, Negroes constitute only 27.1% of the taxpayers in the County, as respondent is informed by the County tax commissioner.

ARGUMENT

(1) The Writ of Certiorari Should Be Dismissed as Improvidently Granted, the Judgment Below Not Being Final.

The decision of the Court of Appeals of Georgia under review here is one which affirmed rulings of the trial court denying challenges to the array of grand jurors filed prior to trial (R. 1).

The trial court rulings were rendered at the 1965 April term of Mitchell Superior Court. Pending review, trial of the cases on the merits was postponed. The Court of Appeals of Georgia rendered its decision on September 22, 1965. *Whitus* v. *State,* 112 Ga. App. 328, 145 S.E. 2d 83 (1965). The cases were then tried at the 1965 October term, and petition for certiorari is now pending to review those convictions, No. 519 Misc.

The appeals to the Georgia Court of Appeals from the orders overruling the challenges to the array were taken pursuant to Georgia law, Code Ann. Sec. 6-701, authorizing interlocutory appeals from judgments which "Would have been final if rendered as claimed for."

The jurisdiction of this Court, however, is limited to "Final judgments or decrees rendered by the highest court of a state . . ." 28 U.S.C., Sec. 1257 (3). To be final for purposes of review, the judgment below "must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court directed." *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546, 91 L. Ed. 1662 (1947). "Thus, the requirement of finality has not been met merely because the major issues in a case have been

decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68, 92 L. Ed. 1212 (1948). The finality requirement is one of power, and is designed to prevent piecemeal review. *Pope* v. *Atlantic Coast Line R. R.,* 345 U.S. 379, 381, 97 L. Ed. 1094 (1953).

"Final judgment in a criminal case, the Court has said, means sentence." *Carey* v. *United States,* 375 U.S. 169, 174, 11 L. Ed. 2d 229 (1963). The overruling of a demurrer ordinarily is not final. *Pope* v. *Atlantic Coast Line R. Co.,* supra. The overruling of a plea in bar is not final for purposes of review. *Heike* v. *United States,* 217 U.S. 423, 54 L. Ed. 821 (1910). The fact that state law permits interlocutory appeals does not confer jurisdiction on this Court. *Holcombe* v. *McKusick,* 61 U.S. (20 How.) 552, 15 L. Ed. 1020 (1858).

(2) Petitioners Failed to Carry the Burden of Showing Systematic Exclusion of Negroes from the Grand Jury.

Since the evidence shows that the jury boxes had been revised prior to selection of the grand jury indicting petitioners, for the express purpose of complying with the mandate of the Court of Appeals for the Fifth Circuit, petitioners were required to show discrimination by way of systematic exclusion as to this particular jury box, and the burden of proof was not carried by proof of long-continued exclusion prior to revision.

In setting aside the first conviction of petitioners, the Court of Appeals for the Fifth Circuit adjudicated that Negroes had been systematically excluded from the

grand and petit juries in Mitchell County, Georgia. This determination was based upon the fact that while Negroes constituted 45% of the population of the County, none had ever served on juries within the memory of witnesses, coupled with a concession by the state as to the existence of discrimination under applicable decisions. *Whitus and Davis* v. *Balkcom*, 333 F. 2d 496 (C.A. 5th, 1964). Therefore, there would be no point in proving a fact already adjudicated.

Following receipt of the mandate by the Superior Court in January, 1965, and pursuant thereto, the jury commissioners of Mitchell County revised the jury lists in February. Of the 33 jurors drawn for grand jury service at the April Term at which petitioners were indicted, 3 were Negroes, one of whom actually served on the grand jury. Of the 90 jurors drawn for the October, 1965 term at which petitioners were tried, at least 7 were Negroes. Under Georgia law, the 6 jury commissioners appointed by the judge of the superior court, Ga. Code Sec. 59-101, select the names of jurors for the jury boxes (rolls) from the books of the tax receiver, viz.:

> "Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.
>
> The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon

other tickets. The entire number first selected, including these afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead." Ga. Code Sec. 59-106.

The names so selected are placed in jury boxes, Ga. Code Sec. 59-108, and also entered on the minutes of the Superior Court. Code Sec. 59-109. Names are drawn from the boxes each term to make up the venire. Code Secs. 59-203, 59-701, 59-801.

The qualifications for jurors under Georgia law are as set forth in Sec. 59-106, quoted above. Additional qualifications are specified for grand jury service.[8] Women are also qualified, but not compellable, to serve as jurors, and may notify the jury commissioners of their desire not to serve. Code Sec. 59-124. Other classes of persons are exempt, but not disqualified from serving, such as ministers, teachers, physicians, etc. Code §59-112.

"Whenever by any action of a state, whether through

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[8]Code Sec. 59-201 provides: "All citizens of this State, above the age of 21 years, being neither idiots, lunatics, nor insane, who have resided in the county for six months preceding the time of serving, and who are the most experienced, intelligent, and upright persons, are qualified and liable to serve as grand jurors, unless exempted by law: Provided, however, that county commissioners, tax receivers, tax collectors, members of the county board of education, county school commissioners, ordinaries, and county treasurers shall be incompetent to serve as grand jurors during their respective terms of office."

its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as . . . jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States." *Carter* v. *Texas,* 177 U.S. 442, 447, 44 L. Ed. 839 (1900). "When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand." *Patton* v. *Mississippi,* 332 U.S. 463, 469, 92 L. Ed. 76 (1947). However, discrimination must be proven by evidence. *Smith* v. *Mississippi,* 162 U.S. 592, 601, 40 L. Ed. 1082 (1896); *Carter* v. *Texas,* 177 U.S. 442, 447, 44 L. Ed. 839 (1900); *Brownfield* v. *South Carolina,* 189 U.S. 426, 47 L. Ed. 882 (1903); *Akins* v. *Texas,* 325 U.S. 398, 89 L. Ed. 1692 (1945); *Martin* v. *Texas,* 200 U.S. 316, 50 L. Ed. 497 (1906); *Franklin* v. *South Carolina,* 218 U.S. 161, 167, 54 L. Ed. 980 (1910). "But such an actual discrimination is not presumed. It must be proved or admitted." *Tarrance* v. *Florida,* 188 U.S. 519, 520, 47 L. Ed. 572 (1902); *Akins* v. *Texas,* supra. "Also, where discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant." *Fay* v. *New York,* 332 U.S. 261, 285, 91 L. Ed. 2043 (1947); *Akins* v. *Texas,* supra; *Hoyt* v. *Florida,* 368 U.S. 57, 69, 7 L. Ed. 2d 118 (1961); *Swain* v. *Alabama,* 380 U.S. 202, 226, 13 L. Ed. 2d 759 (1965).

While token inclusion does not satisfy the Constitu-

tion, *Brown* v. *Allen*, 344 U.S. 443, 471, 97 L. Ed. 469 (1953); *Smith* v. *Texas*, 311 U.S. 128, 130, 85 L. Ed. 84 (1940); *Billingsley* v. *Clayton*, 359 F. 2d 13 (C.A. 5th 1966); the mere fact that there are no Negroes on the grand or petit jury in a given case does not establish discrimination, *Virginia* v. *Rives*, 100 U.S. 313, 25 L. Ed. 667 (1880); *Bush* v. *Kentucky*, 107 U.S. 110, 117, 27 L. Ed. 354 (1883); *Martin* v. *Texas*, 200 U.S. 316, 320, 50 L. Ed. 497 (1906); *Akins* v. *Texas*, supra (325 U.S. at 403); *Hoyt* v. *Florida*, 368 U.S. 57, 7 L. Ed. 2d (1961); *Fay* v. *New York*, 332 U.S. 261, 285, 91 L. Ed. 2043 (1947), for "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury." *Hoyt* v. *Florida*, supra. An accused is not entitled to demand proportional representation of his race on the jury in his case. *Thomas* v. *Texas*, 212 U.S. 278, 53 L. Ed. 512 (1909); *Akins* v. *Texas*, supra; *Swain* v. *Alabama*, supra (380 U.S. at 208); *Fay* v. *New York*, supra (332 U.S. at 291); *Cassell* v. *Texas*, 339 U.S. 282, 291, 94 L. Ed. 839 (1950); *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (C.A. 5th), *cert. den.* 361 U.S. 838, 4 L. Ed. 2d 78 (1959); *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53 (C.A. 5th 1962), *cert. den.* 372 U.S. 924, 9 L. Ed. 2d 729 (1963); *Scott* v. *Walker*, 358 F. 2d 56 (C.A. 5th 1966); *Billingsley* v. *Clayton*, 359 F. 2d 13 (C.A. 5th 1966). Indeed, he is not even entitled to demand that any member of his race serve. *Strauder* v. *West Virginia*, 100 U.S. 303, 305, 25 L. Ed. 664 (1880); *Virginia* v. *Rives*, 100 U.S. 313, 25 L. Ed. 667 (1880); *Neal* v. *Delaware*, 103 U.S. 370, 26 L. Ed. 567 (1881); *Bush* v. *Kentucky*, supra; *Wood* v. *Brush*, 140 U.S. 278, 285, 35 L. Ed. 505 (1891); *Jugiro* v. *Brush*, 140 U.S. 291, 297, 35 L. Ed. 510 (1891); *Akins* v. *Texas*, supra.

Where as here, prior discrimination was laid bare, and a revision took place, what transpired before revision is irrelevant. *Cassell* v. *Texas,* 339 U.S. 282, 94, L. Ed. 839 (1950); *Akins* v. *Texas,* 325 U.S. 398, 89 L. Ed. 1692 (1945). "Former errors cannot invalidate future trials .... It is this particular box that is decisive." *Brown* v. *Allen,* 344 U.S. 443, 479, 97 L. Ed. 469 (1953). In this respect, the evidence in this case discloses that the boxes were revised in February before the reindictment of petitioners in April and their retrial in October. Three Negroes were on the grand jury venire, and at least 7 were on the petit jury venire. Although Negroes constitute 45% of the county population, they constitute only 27.1% of the names on the tax digest from which jurors are selected.[9] Counsel for both petitioners elicited from a jury commissioner his estimate that Negroes constituted 25 or 30 per cent of the names in the jury boxes after revision, although the witness stated that it could be higher.[10] Counsel for petitioners made no effort to secure the minutes of the Court for the purpose of submitting the jury lists to the commissioners or other Court officials and asking them on the witness stand to identify the Negro jurors thereon. The disparity between the percentage of Negro taxpayers and the percentage in the jury box could well be explained by the difference in

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[9]Information furnished by Hon. Elwood Williams, Tax Commissioner of Mitchell County. At the trial of petitioners in October, 1965, subsequent to the decision now under review, witness W. H. Grogan estimated that Negroes constituted 30% of the taxpayers.

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[10]Id.

the relative qualifications of the two races.[11] "We recognize the fact that these lists have a higher proportion of white citizens than of colored, doubtless due to inequality of educational and economic opportunities." *Brown* v. *Allen*, 344 U.S. 443, 473, 97 L. Ed. 469 (1953), and see *Swain* v. *Alabama*, supra (380 U.S. at 208).

Here, the jury commissioners testified that in revising the boxes pursuant to directions of the trial judge who pointed out the requirements imposed by previous litigation, they did not consider race or color. While the "mere, general assertions by officials of their performance of duty" is not sufficient to overcome the evidence of long continued exclusion where Negroes constitute a substantial proportion of the population and many are seen to be qualified, *Norris* v. *Alabama*, 294 U.S. 587, 598, 79 L. Ed. 1074 (1935); *Smith* v. *Texas*, 311 U.S. 128, 85 L. Ed. 84 (1940); *Hernandez* v. *Texas*, 347 U.S. 475, 481, 98 L. Ed. 866 (1954); *Reece* v. *Georgia*, 350 U.S. 85, 88, 100 L. Ed. 77 (1955); *Eubanks* v. *Louisiana*, 356 U.S. 584, 589, 2 L. Ed. 2d 991 (1958), such statements are accorded weight where not rebutted nor deemed improbable. *Brown* v. *Allen*, 344 U.S. 443, 481, 97 L. Ed. 469 (1953); *Fay* v. *New York*, 332 U.S. 261, 277, 91 L. Ed. 2043 (1947); *Moore* v. *New York*, 333 U.S. 565, 568, 92 L. Ed. 881 (1948).

The Negro representation here compares favorably with that upheld in *Swain* v. *Alabama*, supra; *Brown* v.

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[11]Mitchell County has 2124 non-white citizens 25 years of age or older who are functionally illiterate. See United States Census of Population, 1960, Georgia, General Social and Economic Characteristics, U. S. Department of Commerce, Bureau of the Census, PC(1) 12c Ga., p. 339.

Allen, supra, and in *Billingsley* v. *Clayton*, 359 F. 2d 13 (C.A. 5th 1966). The evidence shows that the jury boxes had been revised and that Negroes are now serving. There was no effort to prove that any larger percentage of Negroes were qualified for jury service. Petitioners simply sought to rely on evidence of past discrimination prior to revision, but as we have before shown, this is irrelevant. Petitioners simply failed to carry the burden.

Insofar as it is contended that the Georgia jury selection statutes are unconstitutional for failure to prescribe standards, it is enough to say, as this Court did in *Fay* v. *New York*, 332 U.S. 261, 272, 91 L. Ed. 2043 (1947):

> "It has consistently been held that a jury is not rendered constitutionally invalid by failure of the statute to set forth any standards for selection."

See also, in accord, *Murray* v. *Louisiana*, 163 U.S. 101, 108, 41 L. Ed. 87 (1896); *Ex parte Virginia*, 100 U.S. 339, 348, 25 L. Ed. 667 (1879); *Franklin* v. *South Carolina*, 218 U.S. 161, 168, 54 L. Ed. 980 (1910); *Akins* v. *Texas*, 325 U.S. 398, 403, 89 L. Ed. 1692 (1945).

(3) The Use by the Jury Commissioners of the Tax Digest, Required by Law to List Negro Taxpayers Separately, Affords No Basis for Constitutional Attack.

Under Georgia law, the names of jurors are selected from the books of the county tax receiver. Ga. Code Sec. 59-106. With respect to the books of the tax receiver, Ga. Code Sec. 92-6307, prior to repeal in 1966 (Ga. Laws 1966, p. 393), provided:

> "The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order.

> Names of colored and white taxpayers shall be made but separately on the tax digest."

The evidence here showed that the revised jury list was taken from the "tax digest" as distinguished from the "returns" made by individual taxpayers, the digest being a consolidation of the later (R. 21, 27, 33). Prior to 1965, the tax return sheets furnished by the State Revenue Department to the counties were white for white taxpayers, and yellow for Negro taxpayers. Since the return sheets were not used in making up the jury lists, this practice is constitutionally irrelevant as far as this case is concerned. In any event, the evidence shows that the jury commissioners were not even aware of it, and the practice was discontinued in 1965.

The tax digests for the races are separate, however, and it is this fact, coupled with the requirement that the jury lists be made from the tax records, that petitioners assail as being unconstitutional on the ground that it "provides unnecessary opportunities for discrimination," citing *Avery* v. *Georgia,* 345 U.S. 559, 97 L. Ed. 1244 (1953).

A similar contention was rejected in *Maxwell* v. *Stephens,* 348 F. 2d 325 (C.A. 8th 1965); *Harris* v. *Stephens,* 361 F. 2d 888, 892 (C.A. 8th 1966).

The validity of Code Sec. 92-6307 if attacked in a direct proceeding by way of injunction is not at issue here. See *Anderson* v. *Martin,* 375 U.S. 899, 11 L. Ed. 2d 439 (1964); *Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156 (E.D. Va.), *aff'd. sub nom. Tancil* v. *Woolls,* 379 U.S. 19, 13 L. Ed. 2d 91 (1964). The question is whether under the facts of this case, the

practice is seen to be harmful, for harmless error is no ground for complaint. Cf. Rule 61, Fed. Rules Civ. Proc.

In *Avery* v. *Georgia*, supra, and in *Williams* v. *Georgia*, 349 U.S. 375, 99 L. Ed. 1161 (1955), this Court held that the placing of the names of white and Negro jurors in the jury box on different colored slips of paper was such error as would require a new trial, where seasonably challenged, on the reasoning that,

> "Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process. And, in view of the case before us; where not a single Negro was selected to serve on a panel of sixty—though many were available—we think that petitioner has certainly established a prima facie case of discrimination." *Avery* v. *Georgia*, supra (345 U.S. at 562).

The determinative factor in *Avery* is the *crucial stage* at which the different colored slips afforded an opportunity for discrimination. The slips are placed in the box to serve the function of affording a fair and impartial means of selecting the venires through the chance drawing of names for each term of court. This procedure by its nature is designed to be so conducted as to eliminate the element of conscious choice in the selection process. It takes place at the critical point when each panel for the coming term of court is in the actual process of being made up. Any distinguishing marks therefore tend to destroy the very element of chance which the drawing of names from a box is designed to achieve. As pointed out by Mr. Justice Frankfurter's concurring opinion in *Avery*, the openings in the jury

boxes were of sufficient size to enable the judge drawing the slips to distinguish their color. 345 U.S. at 564. In other words, the different colored slips injected "color" where it was peculiarly important that the selection process be color blind.

Such is not the case here, for the difference is between selecting the jury rolls, and selecting the venires. With respect to the former, involved in this case, the decisions of this Court place an affirmative duty on jury commissioners to consider race, for in no other way can they be sure that the jury consists of a cross-section of the community:

> "What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintances, discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them." *Smith* v. *Texas,* 311 U.S. 128, 132, 85 L. Ed. 84 (1940).

And, in *Hill* v. *Texas,* 316 U.S. 400, 404, 86 L. Ed. 1559 (1942), this Court declared that it was the duty of jury commissioners, imposed by Section 4 of the Civil Rights Act of 1875, to make an "effort to ascertain whether there were within the County members of the colored race qualified to serve as jurors, and if so, who they were." In *Cassell* v. *Texas,* 339 U.S. 282, 94 L. Ed. 839 (1950), convictions were reversed because of failure of the jury commissioners to acquaint themselves with Negroes in the County in order to ascertain their qualifications. See also *Eubanks* v. *Louisiana,* 356 U.S. 584, 2 L. Ed. 2d 991 (1958), and *United States ex rel. Seals*

v. *Wiman*, 304 F. 2d 53 (C.A. 5th 1962), cert. den. 372 U.S. 924, 9 L. Ed. 2d 729 (1963).

Just recently, the Fifth Circuit alluded to this fact in *Brooks* v. *Beto*, ___ F. 2d ___, 35 L.W. 2077 (July 29, 1966), where it was said that "How then can it be said that conscientiously to do what the Constitution demands makes the result bad because race had been consciously considered to assure that race has not been the basis of discrimination?"

Moreover, any racial differentiation appearing on the tax digests would not give the jury commissioners any information they did not already have. While the process of drawing the venires from the box is intended to be rapid, routine, indiscriminate, and completely without regard to the identity of individuals, the making up of the jury lists is something entirely different. The former is purely a mechanical, impersonal operation. The latter is personal and deliberative. Georgia law imposes certain qualifications for jury service, such as that the juror be "experienced, intelligent and upright," Code §59-106, and that grand jurors be "above the age of 21 years, being neither idiots, lunatics, nor insane, who have resided in the county for six months preceding the time of serving, and who are the most experienced, intelligent and upright persons . . ." Code §59-201.

For the jury commissioners to perform their duty in ascertaining these qualifications, they necessarily must either personally know or investigate each prospective juror, and in so doing, it is inevitable that they would either know or discover his racial identity. Moreover, in a county as small as Mitchell, it is unlikely that the commissioners would not already know the racial identity of each citizen. Two of the jury commissioners testified that

they knew all or most of the Negroes in their sections of the county. It is also significant to note that several of the jury commissioners were not even aware that the tax digests were kept separate. In *Brown* v. *Allen,* 344 U.S. 443, 480, 97 L. Ed. 469 (1953), it was held immaterial that the jury tickets of Negroes all had dots thereon, where it was seen that the drawing was always done by a child.

In the present case, there is no evidence to indicate that the separate tax digests actually encouraged any discrimination, or had any reasonable tendency to do so. Nor is there anything to indicate that the statute requiring separate digests, Code §92-6307, was ever intended to have this effect. Georgia law had long required that the names of jurors be taken from the county tax books, a not uncommon provision in many states. See Code of Georgia of 1882, §3910(b). It was not until 1894 that the predecessor of Code §92-6307 was enacted, with passage that year of a brief act limited to this section only. (Ga. Laws 1894, p. 31).

The legislative background of the Act of 1894 discloses that it was not designed to serve a discriminatory purpose. The 1890's were times of great political unrest in Georgia. The Populist Movement was sweeping the country and threatening to divide the Democratic Party in Georgia. At this time, no provision was made by Georgia law for the registration of voters, persons could vote at any election box in the county, often voted at more than one, and at the elections held in 1892, fraud was rampant on both sides. As one historian stated:

> "This election throughout the state was a pathetic example of the venality that too often accompanies the rule by the people. Negro voters were bought

and sold like merchandise and herded around the polls like so many cattle. They were fed at barbecues and made drunk and penned up to prevent them from voting, if they could not be otherwise controlled. Most of them who voted were in the hands of the regular Democrats." Coulter, *Georgia, A Short History*, p. 393 (1947).

Another commentator elaborates even further:

"Many of the planters, owners of turpentine stills, and other employers took their 'hands' to the polls and voted them in gangs. In some of the towns and cities, all-night revelries were held for the darkies on the night before election. Barbecue was served with whiskey and beer by the barrel. Next morning the dusky revelers were marched to the polls by beat of drums, carefully guarded lest some desert in search of another reward. In some of the cities bands of them were taken from one polling place to another and voted under different names. According to the testimony produced in the Watson-Black contested election case, Negroes were brought over from South Carolina in four-horse wagons and voted at various precincts in Augusta. The total vote in that city was double the number of legal voters, eighty per cent of it being Democratic. Somewhat similar methods were employed in the smaller towns. In the country, a considerable number of Populist precincts were thrown out on technicalities. The Democrats were not the only sinners, to be sure; but they were more resourceful, and hence more successful at the game." Alex Mathews Arnett, "The Populist Movement in Georgia," 7 Ga. Hist. Quart. 313, 332 (1923).

The immediate reaction was a demand for election reform. In his "State of the State" address to the 1894 General Assembly, Governor Northen called for a voter's registration law. House Jour. 1894, p. 42. Throughout the months of October and November, 1894, the *Atlanta Constitution* called for an election bill to insure that only qualified persons would be able to vote. See, e.g., issue of Sunday, November 4, p. 18. On November 6, 1894, an election was held at which widespread charges of vote frauds were again reported on both sides in connection with the Tenth District Congressional race in which Tom Watson lost his seat. See *Atlanta Constitution,* November 8, 1894, at p. 4; Id., issue of November 9, p. 4.

The result was passage of Georgia's first registration law (Ga. Laws 1894, p. 115). This Act was designed to insure (1) That only persons duly qualified by registration would be permitted to vote, and (2) That a voter would be permitted to vote only in the district of his residence. Throughout the Act, emphasis was placed on requirements which would enable the responsible officials to properly identify persons claiming a right to register to vote. Conversant with the particular problems previously experienced with Negro voters, the registration Act required identification by race, but it should be noted that the act imposed only purely objective requirements, the literacy requirement not appearing in the law until 14 years later in 1908 (Ga. Laws 1908, p. 27). Undoubtedly, this requirement was made necessary by the fact that traditionally many Negroes were named in honor of their former masters, and after emancipation, their employers.

Under the Constitution in existence at this time, only

those persons who had paid all taxes[5] due the state and county were permitted to vote (Const. of 1877, Art. II, Par. II; *McElreath on the Constitution of Georgia*, §854), and in order to facilitate identification of taxpayers from the tax records during the registration process, House Bill 141, which later became §92-6307, was introduced in the House of Representatives by Representative Rawlings on November 14, 1894 (House J. 1894, p. 230). The *Atlanta Constitution* of Thursday, November 15, 1894, at p. 7, reported the introduction of this bill as part of a story headed "Registration and Elections," which, after referring to the progress of the Voters' Registration bill, stated:

> "Another bill bearing upon qualifications of voters is by Mr. Rawlings of Washington. He provides that it shall be the duty of the tax receivers of the several counties to place the names of the colored taxpayers in each militia district upon the tax digest in alphabetical order and it is provided that the names of the colored and white taxpayers shall be made out separately on the tax digest.
>
> 'The occasion for that bill,' said Mr. Rawlings, 'is simply this: Under the present law there is no requirement of this kind and the tax receivers are in the habit of placing the names of the Negro taxpayers with those of the whites and it is impossible to find out with any degree of ease whether a Negro's name is on the tax digest. You see, it is pretty necessary to know this in election times. This is due

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[5]This related only to ad valorem taxes. The poll tax was not enacted until 1927 (Ga. Laws 1927, p. 57; Code of 1933, §92-108).

to the habit of placing a man's Negro employees with his name on the tax digest. For instance, Mr. Smith's property is returned and with his name is placed the names of the Negroes who work for him and whose names he gives in. My bill provides for separate lists of colored and white taxpayers and that each list shall be kept alphabetically.'"

The foregoing demonstrates that Code Sec. 92-6307 was never designed as a means of encouraging or facilitating discrimination. It was but part of a voters registration effort aimed at preventing vote frauds through voting by unauthorized persons. It could very easily serve the same function today, for many Negro citizens bear the same names as white citizens of their area. Notwithstanding, the General Assembly repealed this part of the law this year (Ga. Laws 1966, p. 393).

The assertion in the brief of petitioners that the act of 1894, and the Voters Registration Act passed the same year, was the "final solution to the problem of the Negro vote," and was "but one of the last entries on the journal of white supremacy" is simply not true, and petitioners do not cite a single authority, historical or otherwise, which so holds. These laws were aimed at fraud in elections, and merely because Negroes as well as white people played a role in the evil sought to be eliminated does not invest the problem with the aura of discrimination.

Respondent deems it also important to point out to the Court the effect of any such ruling as urged here. Under the rulings by the Fifth Circuit in *United States ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71 (C.A. 5th 1959), *cert den.* 361 U.S. 838; *United States ex rel. Seals* v. *Wiman,* 304 F. 2d 53 (C.A. 5th 1962); *cert. den.,* 372 U.S. 924, 9 L. Ed. 2d 729 (1963); *Cobb* v. *Valkcom,*

339 F. 2d 95 (C.A. 5th 1964), and particularly the decision in this case, 333 F. 2d 496, it is virtually impossible for this issue to be waived, when challenged by federal habeas corpus. There are 4896 Negroes now confined in the Georgia prison system. If petitioners prevail on this question, there is not a single one of these prisoners who would not have to be retried. Such chaos should not be countenanced.

(4) Petitioners Should Not Be Set Free in the Event of Reversal.

As previously stated, respondent contends that petitioners failed to make out a case of discrimination, and that consequently the judgment below should be affirmed. However, since petitioners have argued that they should be set free in the event of reversal because of language in the decision of the Court of Appeals, 333 F. 2d 496, respondent will reply thereto.

The proper disposition where a state court conviction has been set aside on grounds of jury discrimination was stated by this Court in *Hill* v. *Texas,* 316 U.S. 400, 406, 86 L. Ed. 1559 (1942):

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements, where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand because the constitution prohibits the procedure by which it was obtained."

In *Patton* v. *Mississippi,* 332 U.S. 463, 469, 92 L. Ed. 76 (1947), it was further said:

> "As we pointed out in *Hill* v. *Texas*, 316 U.S. 400, 406, . . . our holding does not mean that a guilty defendant must go free. For indictments can be returned and convictions can be obtained by juries selected as the constitution commands."

And more recently, in *Eubanks* v. *Louisiana*, 356 U.S. 584, 589, 2 L. Ed. 2d 991 (1958), this Court declared:

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for the state may indict and try him again by the procedure which conforms to constitutional requirements."

The purpose of the direction in the decision of the Court of Appeals requiring that petitioners be retried within 8 months was obviously designed to prevent them from being detained indefinitely in jail on a non-bailable offense without ever being brought to trial. The Fifth Circuit did not intend to set a trap for the State. Forfeitures are no more favored when sought to be invoked against the state than against an accused. A serious and senseless crime has been committed. The perpetrators should not be set free simply because as petitioners claim, the jury commissioners bungled. There is no claim that petitioners have been prejudiced in any way by the delay. Indeed, it is a matter of common knowledge among lawyers that an accused stands in a more favorable position when his case is tried at a time remote to the date of the offense, after public indignation toward the offense has subsided. Added to this, the record below evinces an admirable spirit of cooperation on both sides with respect to stipulations concerning the admissibility of testimony of deceased witnesses.

The colorful language of petitioners' brief referring

to racial murders in Mississippi, the "totality of the system of segregated justice" in the South, the Selma marches, and an attempted justification of race riots, might well be appropriate were this case for decision by a lay jury composed of members of SNCC and the American Civil Liberties Union, but such arguments manifestly have no place before this Court. If the rights of petitioners in their case have been denied, they are entitled to relief. But they are not entitled to be set free simply because, as counsel contends, equal justice has not always been achieved in other areas. The answer for discrimination is to eliminate it, not to compound it by adding another even more invidious.

CONCLUSION

The case should be dismissed for lack of jurisdiction, certiorari having been improvidently granted. Otherwise, the judgments below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 650 AND 253.—OCTOBER TERM, 1966.

650	Phil Whitus and Leon Davis, Petitioners, *v.* State of Georgia.	On Writ of Certiorari to the Supreme Court of Georgia.
253	Phil Whitus and Leon Davis, Petitioners, *v.* State of Georgia.	On Writ of Certiorari to the Court of Appeals of Georgia.

[January 23, 1967.]

MR. JUSTICE CLARK delivered the opinion of the Court.

Once again we are confronted with the question of racial discrimination in the selection of the grand and petit juries which have respectively indicted and found petitioners guilty of the offense of murder. The claim is that Georgia's system of jury selection resulted in the systematic exclusion of Negroes from both the grand and petit juries in that its law required jury commissioners to select the names of prospective jurors from the books of the county tax receiver which were maintained on a racially segregated basis. Ga. Code § 59–106. The grand jury question is raised in both cases and we consolidated them for argument and do likewise on disposition.

No. 253 is an interlocutory appeal from a judgment denying petitioners' claim as to the grand jury which indicted them. Georgia law authorizes such an appeal, Ga. Code Ann. § 6-701, and it was first perfected to the Supreme Court of Georgia which transferred it to the Georgia Court of Appeals. That court affirmed the denial of the claim of discrimination. 112 Ga. App. 328, 145 S. E. 2d 83. We granted certiorari. 384 U. S. 1000.

(1966). In view of the lack of finality of the order in this case, we dismiss the writ in No. 253 as improvidently granted and proceed to dispose of both the grand and petit juries questions in No. 650.

Following affirmance by the Georgia Court of Appeals of the interlocutory appeal, the trial court proceeded to try petitioners' cases on the merits. After a challenge to the array of petit jurors was denied, petitioners were put to trial and were convicted. The Supreme Court of Georgia affirmed. *Whitus* v. *State*, 222 Ga. 103, 149 S. E. 2d 130; *Davis* v. *State*, 222 Ga. 114, 149 S. E. 2d 130. We granted certiorari. 385 U. S. 813 (1966). We find that the circumstances here, unexplained by the State, are sufficient to support petitioners' claims of discrimination and reverse the judgments.

I.

The petitioners have been here twice before. They were originally convicted in 1960 and the Supreme Court of Georgia affirmed. *Davis* v. *State*, 216 Ga. 110, 114 S. E. 2d 877; *Whitus* v. *State*, 216 Ga. 284, 116 S. E. 2d 205. We denied certiorari. 365 U. S. 831 (1961). Thereafter a writ of habeas corpus was filed in the United States District Court for the Southern District of Georgia in which, for the first time, petitioners attacked the composition of the grand and petit juries. The District Court dismissed the writ and the Court of Appeals affirmed. 299 F. 2d 844. On writ of certiorari, we vacated that judgment and remanded the case to the District Court for a hearing on the claim of discrimination. *Whitus* v. *Balkcom*, 370 U. S. 728 (1962). On remand, the District Court again dismissed the petition on the ground that the claim had been waived since it was not raised in the Georgia courts. The Court of Appeals reversed, holding that Negroes had been systematically excluded from both the grand and petit juries. *Whitus*

and Davis v. *Balkcom*, 333 F. 2d 496. Its ruling was based on a finding that 45% of the population of the county was Negro; yet, none had ever served on juries within the memory of the witnesses.

II.

After the Court of Appeals set aside the first conviction, *Whitus and Davis* v. *Balkcom, supra*, the Superior Court of Mitchell County directed the jury commissioners for the county to revise the jury list. Georgia law requires that the six commissioners appointed by the Superior Court "select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets." Ga. Code § 59–106. They are also directed to select from this group a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, writing their names on other tickets. The entire group, excepting those selected as grand jurors, constitute the body of traverse jurors. The tickets on which the names of the traverse jurors are placed are deposited in jury boxes and entered on the minutes of the Superior Court. Ga. Code §§ 59–108, 109. The veniremen are drawn from the jury boxes each term of court and it is from them that the juries are selected.

The State admits that prior to 1965, the tax return sheets furnished by the State Revenue Department, Ga. Code § 92–6302, were white for white taxpayers and yellow for Negro taxpayers. The 1964 tax digest, and all digests prior to 1964, were made up from these segregated tax returns. Furthermore, the jury lists for each county are required by law to be made up from the tax digest. Ga. Code § 59–106. The State further admits that the "revised" jury list from which both the grand and petit juries serving in these cases were selected, had been made

up by reference to the old jury list, which the Court of Appeals had condemned, and the 1964 tax digest, which had been prepared from the white and yellow tax return sheets of that year. However, the jury commissioners did not use the 1964 tax returns themselves, nor the 1965 tax digest which had not yet been made up. The tax digest appears to have been in one volume but was segregated into two sections—one for white and the other for Negro taxpayers. The Negroes whose names were included in the tax digest were designated by a (c) being placed opposite their names as required by Ga. Code § 92-6307.

The three jury commissioners who appeared as witnesses testified that they were not aware of the letter (c) appearing after the names of the Negroes on the 1964 tax digest; that they never included or excluded anyone on the "revised" jury list because of race or color; that they placed on the "revised" jury list those persons whom they knew personally from their respective communities; that there were around 600 selected; and, that the "revised" list, which the commissioners themselves prepared, had no designation of race upon it.

III.

For over four score years it has been federal statutory law, 18 Stat. 336, 8 U. S. C. § 44 (1875); 18 U. S. C. § 243 (1948), and the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); see also *Pierre* v. *Louisiana*, 306 U. S. 354 (1939). There is no controversy as to the constitutional principle—the question involved is its application to the facts disclosed in this record. It is our province

to "analyze the facts in order that the appropriate enforcement of the federal right may be assured," *Norris* v. *Alabama*, 294 U. S. 587, 590 (1935), and while the conclusions reached by the highest court of the State "are entitled to great respect. . . . [I]t becomes our solemn duty to make independent inquiry and determination of the disputed facts. . . ." *Pierre* v. *Louisiana*, *supra*, at 358. The burden is, of course, on the petitioners to prove the existence of purposeful discrimination, *Tarrance* v. *Florida*, 188 U. S. 519 (1903). However, once a prima facie case is made out the burden shifts to the prosecution.

It is undisputed that the "revised" jury list was made up from the 1964 tax digest, the old jury list and the personal acquaintance of the commissioners with persons in their respective communities. It is admitted that the old jury list had been condemned as illegal by the Court of Appeals when it reversed petitioners' first conviction. It is conceded that 27.1% of the taxpayers in the county are Negroes; that the county had a population in 1960 of 10,206 people over the age of 21 years of whom 4,706 were male[1] with 2,004, or 42%, of this latter number being Negroes; that 33 prospective jurors were drawn for grand jury service for the term of court during which petitioners were indicted, three being Negroes, of whom one actually served on the grand jury of 19 persons; that a venire of 90 persons was used for the selection of the petit jury which tried petitioners, of which number at least seven were Negroes; and, that no Negro was accepted on the petit jury.

Furthermore, it is obvious that the 1964 tax digest was required to be made under the same segregated system as were the previous digests, and suffered the same deficiency. Indeed, the State employed the same

[1] Women, while qualified to serve, are not compelled to serve and may be excused upon request. Ga. Code § 59–124.

procedure which it concedes resulted in discrimination in the petitioners' first trial.

We believe that this proof constituted a prima facie case of purposeful discrimination. While the commissioners testified that no one was included or rejected on the jury list because of race or color this has been held insufficient to overcome the prima facie case. *Norris* v. *Alabama, supra,* at 598. The State also insists that the revision of the jury list made evidence of the former practice of exclusion irrelevant. However, as we have seen, this revision was suspect. At the least it was based on the old jury roll which had been specifically condemned by the Court of Appeals and the 1964 tax digest which was suspect because of the system by which it was required to be prepared. The Court of Appeals condemned this same system in reversing the original conviction.

We believe that the circumstances here are akin to those condemned in *Avery* v. *Georgia,* 345 U. S. 559 (1952). There the names of the prospective Negro jurors were placed in the jury box on yellow colored tickets. Here the commissioners used the old jury roll which had been condemned by the Court of Appeals and the 1964 tax digest which was required by law to be, and was, maintained on a racially segregated basis. Moreover, it was prepared from the tax returns of Negroes which, at the time, were required to be filed on yellow sheets of paper while the returns of white persons were on white sheets. It is this old "system of selection" condemned by the Court of Appeals "and the resulting danger of abuse which was struck down in *Avery* . . . ." *Williams* v. *Georgia,* 349 U. S. 375, 382 (1955). Nor does the fact that the commissioners selected prospective jurors on the basis of personal acquaintance correct the evil. See *Cassell* v. *Texas,* 339 U. S. 282, 289 (1950).

Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.3%) and the petit jury venire (7.8%) strongly point to this conclusion.[2] Although the system of selection used here had been specifically condemned by the Court of Appeals, the State offered no testimony as to why it was continued on retrial. The State offered no explanation for the disparity between the percentage of Negroes on the tax digest and those on the venires, although the digest must have included the names of large numbers of "upright and intelligent" Negroes as the statutory qualification required. In any event the State failed to offer any testimony indicating that the 27.1% of Negroes on the tax digest were not fully qualified. The State, therefore, failed to meet the burden of rebutting the petitioners' prima facie case.

It is contended by petitioners that in the event of a reversal of the decision below they should be set free rather than retried. This contention arises from language used by the Court of Appeals in reversing the original conviction. The court expressed its "present opinion

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[2] While unnecessary to our disposition of the instant case, it is interesting to note the "probability" involved in the situation before the Court.

The record does not indicate how many Negroes were actually on the "revised" jury list of approximately 600 names. One jury commissioner, however, said his best estimate was 25% to 30%, which is in close proximity to the 27.1% who were admittedly on the tax digest for 1964. Assuming that 27% of the list was made up of the names of qualified Negroes, the mathematical probability of having seven Negroes on a venire of 90 is .000006. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966).

that a period of eight months . . . will be sufficient to afford the State an opportunity to take the necessary steps to re-indict and retry the petitioners." *Whitus and Davis* v. *Balkcom, supra,* at 510. The theory is that a constitutional procedure was not provided within the eight-month period and that a remand for a new trial would be beyond that period. We are not persuaded by this logic. The proper disposition where a state court conviction is set aside on the ground of jury discrimination is stated in *Hill* v. *Texas,* 316 U. S. 400, 406 (1942):

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements."

See also *Patton* v. *Mississippi,* 332 U. S. 463, 469 (1947); *Eubanks* v. *Louisiana,* 356 U. S. 584, 589 (1958).

The judgment is, therefore, reversed for further proceedings not inconsistent with this opinion.

It is so ordered.